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INTRODUCTION

In a recently published book on the status of civil liberties in wartime,[1] Chief Justice William H. Rehnquist offers a surprising defense[2] and rationalization[3] of the Japanese American[4] internment. One

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[1] *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

[2] *See id.* at 209–10. Rehnquist defends with little qualification the internment of immigrant Japanese Americans (issei): "The Issei, however, who were not citizens, were both by tradition and by law in a quite different category. . . . Thus, distinctions that might not be permissible between classes of citizens must be viewed otherwise when drawn between classes of aliens." *Id.*

[3] *See id.* at 224. Regarding the internment of second generation Japanese Americans (nisei), Rehnquist is slightly more circumspect, acknowledging that such treatment of a racially defined class of citizens would violate current constitutional law. *See id.* at 207. However, Rehnquist argues "the law was by no means clear in 1943 and 1944." *Id.* He concludes that speculating about judicial restraint of governmental misconduct in "wartime" is "very largely academic. There is no reason to think that future wartime presidents will act differently from . . . Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors." *Id.* at 224. The Chief Justice states his belief in a "historic trend" against the "least justified of the curtailments of civil liberty in wartime," but by implication he would not count the internment among these. *See id.* For a more sympathetic view of Rehnquist's handling of the internment than the one offered in this article, see Cass R. Sunstein, *Rights Under Fire*, THE NEW REPUBLIC, Nov. 9, 1998, at 42, 46 (book review) (accepting that Rehnquist's "practical" approach to civil liberties in wartime "may be the most that we can reasonably expect").

[4] I use the term Japanese American to refer to both Japanese American citizens and residents of Japanese descent. Japanese immigrants to the United States were not eligible for citizenship until 1952. *See* Ozawa v. United States, 260 U.S. 178 (1922). The second generation, comprising Japanese Americans born in the United States, obtained birthright citizenship status under the Fourteenth Amendment. *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898). Thus, the distinction between citizen and noncitizen among people of Japanese descent was necessitated chiefly by a racially biased law of nationality. My use of the term Japanese American to refer to both citizens and noncitizens recognizes the *de facto* membership of issei in "American" society. Note that this view contradicts Justice Rehnquist who uses the formal distinction between issei and nisei to defend the internment of issei. *See* REHNQUIST, *supra* note 1, at 209–10.

might have assumed that the official debate on the internment had closed in 1988 when, in an exceptional act of national contrition, President Ronald Reagan signed into law the Civil Liberties Act that formally acknowledged the internment's injustices.[5] Indeed, this Symposium is a direct result of the Government's recognition of its debt to Japanese Americans and the need to repair and redress, at least symbolically, their injuries. So why, and how, does Chief Justice Rehnquist re-open the debate on the internment's legitimacy?

This article may help to answer these questions and refute the Chief Justice's position on the internment[6] by identifying and critiquing the conceptual and discursive foundations of foreign affairs and national security law (hereinafter foreign affairs law)[7] that underwrite and grow from the internment jurisprudence. These "background" conceptual and discursive features, though seldom examined by legal scholars, guide understandings of foreign affairs jurisprudence emanating from across the political spectrum.[8] Scholars have typically analyzed foreign affairs law within a binary matrix of conflicting imperatives: on one side, the demands of "the national interest" and, on the other, the constraints of constitutional democracy. Debates then re-

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[5] *See* Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1989 (1988)). Of course, the Government would probably never have acknowledged wrongdoing absent the political activism of those working in the redress and reparations movement. *See generally* LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993). For an incisive critique of the redress and reparations movement, see Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, in this issue, at 385.

[6] Indeed, it is ironic that the critique mounted here, conceived and mostly written before publication of Chief Justice Rehnquist's book, is grounded in a new reading of the internment. So, whereas the Chief Justice defends and rationalizes the internment in the process of forwarding a theory of civil liberties in wartime, I use the internment as a central point of reference in critiquing the deficiencies of such traditional foreign affairs-based legal theory.

[7] Combining foreign affairs and national security law under one rubric and analysis may efface distinctions which the discipline has maintained between emergency and non-emergency exercises of "externally" directed governmental power. However, the structural similarities that are the focus of this article warrant the conflation. Indeed, one argument forwarded here is that the "tail" of national security law wags the "dog" of foreign affairs law through the operation of the realist ontology. *See infra* Part I; Joel Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 671–73 (1998) (arguing that appeals to geopolitical exigency drove foreign affairs law in the Cold War period).

[8] *See, e.g.*, Sunstein, *supra* note 3, at 46 (characterizing Rehnquist's approach to civil liberties in wartime as "complicated and nuanced," "with considerable appeal of its own" as opposed to the polar extremes of the "national security camp" and "the civil libertarian camp"). Sunstein does not condemn Rehnquist's view of the internment, although he would favor a slightly more moderate approach. *See id.* ("In the Korematsu case, for example, [Justice] Jackson's moderate [dissenting] position seems better than Rehnquist's moderate position."). I would argue that a liberal theorist such as Sunstein can find common ground with a conservative such as Rehnquist on foreign affairs law because of shared assumptions regarding the nature of international relations.

volve around questions of how to apply the Constitution in the "vast external realm"[9] of foreign affairs, a realm presumed to be constitutionally *sui generis*.[10] But seldom is a serious attempt made to question the nature of this vast external realm, the assumed referent of foreign affairs law.

With regard to the internment, the conceptual point of departure of this article is the familiar legal linchpin of internment jurisprudence—military necessity. The story goes that if military necessity could be shown or inferred from the record, under the expansive war power, the President, Congress, or both acting together would be authorized to take extreme measures to safeguard national security. Civil rights of Japanese American citizens and residents would be at their lowest ebb, and the power of the political branches would be at its zenith.[11] Courts would be ill-advised and perhaps without power to challenge a decision of the war makers (President, Congress and the military) regarding such "necessity."[12] It follows that internment was a "legitimate" response to an emergency situation arising in the external realm.[13]

In this article, I explore the nature of foreign affairs law's referent external realm by taking seriously the military necessity argument and thus situating the Japanese American internment as foreign affairs law precedent. I will argue, contrary to most commentators, that the internment is an important instance of modern foreign affairs law and warrants consideration on par with two other great twentieth century foreign affairs precedents: of the 1936 case *United States v. Curtiss-Wright Export Corp.*[14] and of the 1952 case *Youngstown Sheet & Tube Co.*

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[9] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm [of foreign affairs], with its important complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

[10] *See infra* Part I.B.2.a-c.

[11] *See* REHNQUIST, *supra* note 1, at 224 ("[I]n time of war the government's authority to restrict civil liberty is greater than in peacetime.").

[12] *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 (1962) ("[T]here are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity.").

[13] Of course the case for internment was based on fraud. *See infra* Part II.

[14] 299 U.S. 304. In *Curtiss-Wright* the Court examined the constitutionality of an executive proclamation issued by President Franklin D. Roosevelt that forbade weapons trade with parties to an armed conflict in the South American region known as the Chaco. The presidential proclamation, which had been authorized by a joint resolution of Congress, imposed both a monetary and prison penalty on violators. Curtiss-Wright Export Corporation was indicted under the joint resolution and proclamation and challenged the constitutionality of the delegation to the President of essential congressional functions. The actual holding in the case thus dealt primarily with a delegation question, which has receded in constitutional significance. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 123–28 (1996). However, Justice Sutherland's famous opinion, containing a range of dicta on the question of foreign affairs powers, has

v. Sawyer.[15] The discipline of foreign affairs law[16] has canonized *Curtiss-Wright* and *Youngstown* as polar extremes that define a limited spectrum of available foreign affairs constitutionalisms. From the perspective of the condemnable internment experience it may be possible to present an alternative vision of foreign affairs law that escapes the narrow vision of the disciplinary "tale of two precedents."[17]

In order to understand the limitations of the disciplinary vision, Part I traces within foreign affairs law the effects of a conceptual and discursive formation[18] that has dominated the scientific study of international relations[19]—the so-called realist[20] paradigm of international relations (hereinafter IR realism). First, I briefly introduce the basic intellectual paradigm of IR realism. Then I discuss how this paradigm

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remained a subject of intense debate in constitutional and foreign affairs jurisprudence and scholarship.

[15] 343 U.S. 579 (1952). In *Youngstown*, a labor dispute threatened to disrupt steel production during the Korean conflict. President Truman ordered the Secretary of Commerce to take control of the mills to insure continued production. Congress did not take specific action in the matter, although it had provided for plant seizures in such contexts under a different procedure. The Court ruled that the seizure overstepped the President's power under the circumstances. *See id.* at 588–89.

[16] Although I refer to foreign affairs as a discipline, technically it would probably be more correct to view the area as a subdiscipline of law. However, foreign affairs/national security law is indeed discipline-like in the ways it structures and sets limits on intellectual and scholarly activity within the field of study that it defines.

[17] At first glance, this choice of precedents—the domestic internment of a racially defined group of citizens and residents—may seem out of place in the foreign affairs context. However, the approach taken here challenges precisely the distinction between a rigidly defined outside and inside that has led to the treatment of foreign affairs law as an area to be analyzed apart from the "normal" rule of law. Moreover, the government's war power, in a sense the quintessence of its externally focused powers, was expressly invoked to legalize the internment, thus creating a distinct bridge between the operation of foreign affairs law and the maintenance of "internal" social subordination.

[18] I use the term "discursive formation" to refer to elements of discourse that may operate across disciplines and evidence a certain epistemic unity. This notion of discursive formations includes the social conditions that make such formations possible. *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 38 (1972); ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW, TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 7–9 (1994) (introducing Foucauldian concepts including discourse and discursive formation).

[19] International relations is usually understood as the international branch of political science and includes the study of international political economy, international organizations, foreign policy processes (diplomacy), and peace and security studies.

[20] The school of thought referred to herein as IR realism should not be confused with legal realism. Legal realism refers generally to the twentieth century movement challenging formalism and bears comparison with so-called post-positivist approaches to international relations, see *infra* Part III, that consciously diverge from IR realism. For a discussion of post-positivist approaches, see CHRIS BROWN, UNDERSTANDING INTERNATIONAL RELATIONS 55–58 (1997). For an edited collection of legal realist writings, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993).

informs the models of foreign affairs constitutionalism represented by *Curtiss-Wright* and *Youngstown*. I will argue that the operation of an IR realist-animated conceptual framework, or ontology, operates in both cases to construct foreign affairs as a legal realm that must be treated extra-constitutionally, i.e., outside standard rule of law process and discourse.[21] I then extend this critique by examining the "little" constitutional dialectics problematized[22] in the discipline—the President versus Congress, individual rights versus state interest, and judicial review versus political branch autonomy.

At the heart of the IR realist paradigm is the concept of the sovereign state as a unified actor akin to the individual subject of modern philosophy.[23] This understanding of the state leads to divergent conceptualizations of politics in the domestic and the international realm. The domestic realm is the site of a "politics" that coincides with the rule of law discourse of rational governance. The international realm comprises "relations," defined as the absence of rational politics and rule of law governance, i.e., anarchy. Inside the state, competing interests are harmonized through law and the processes of liberal governance. In its external affairs, the state must fend for itself by using the methods of "power politics." Both IR realist conceptualizations, of

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[21] *See* GORDON SILVERSTEIN, IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY 223 (1997) (describing a "prerogative interpretation" of the Constitution that creates "an artificial distinction between foreign and domestic policy powers that has no clear basis in the Constitution itself, and . . . has the potential fundamentally to undermine the whole structure of government"). Silverstein favors a return to an institutionally balanced distribution of foreign affairs power. *See id.* at 223–24.

[22] Problematization refers to the intellectual method by which complexity and ambiguity are homogenized and normalized. *See generally Polemics, Politics, and Problematizations: An Interview with Michel Foucault, in* THE FOUCAULT READER (Paul Rabinow ed. 1984). For example, for 30 or more years, liberal advocates of a less imperialistic American foreign policy have often pursued their project by arguing for a more "democratic" foreign policy process and a greater role for Congress vis-à-vis the President. *See generally infra* text accompanying notes 111–43. Although tactically this framing may have been wise, the President-Congress focus also inadvertently brackets the critique of imperialism (normalization) and obscures important cultural and social determinants of foreign affairs (homogenization). Such cultural and social determinants include those which are the focus of the analysis in this article—racism and xenophobia—as well as others such as heterosexism, patriarchy, class stratification, and nationalism in its majoritarian and regressive forms.

[23] The critique of the modern subject has been a central focus of poststructuralism. *See, e.g.*, Catherine Belsey, *Towards Cultural History, in* A POSTMODERN READER 551 (Joseph Natoli & Linda Hutcheon eds., 1993). Belsey provides a good, brief illustration of the critical discourse on the modern subject and links that critique to the international political context: "[O]ur [Western modern] culture places the subject at the center of the system of signified truths, identifies it as the absolute, extra-linguistic presence which is the origin and guarantee of the fixity of meaning, and targets nuclear weapons on the Soviet Union in defense of its (imaginary) freedom." *Id.* at 561.

the unitary state and of foreign affairs as the realm of relations (not politics), inform the dominant models of foreign affairs constitutionalism and the series of constitutional dialectics around which mainstream and reform discourses have revolved.

Part II looks "inside the state" to juxtapose the experience of the internment with the IR realist conceptual framework of foreign affairs law. The dense record developed by historians and lawyers of a later generation, who fought the internment in the courts and before Congress, provides a telling counterpoint to the impenetrable structuralism of IR realism. In a manner explained by critical approaches to international relations (hereinafter IR critical theory), discussed in Part III, the internment is driven by identity-contingent politics operating in and through governmental bureaucracy. Rather than making a case for the "banality of evil,"[24] this look at the micro-levels of state power will show the effects of purposive individual and group action in concert with a social, cultural, and political structure of racial and xenophobic subordination.

Part III introduces the body of critical scholarship from the field of IR critical theory that has challenged the precepts of IR realism. Put simply, in this school of thought, the state along with other unexamined elements of the IR realist paradigm such as sovereignty, anarchy, and security are understood to be *dependent* variables. Social and cultural factors, ignored in IR realist theory, assume the status of "independent" variables.[25] In other words, the "givens" of IR realist theory come to be viewed as contingent social and cultural constructions. Using such critical international relations theory to rethink foreign affairs law leads to a more central placement of the internment. This is so because the internment cases may be studied to reveal the state

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[24] *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963). Arendt, who studied the trial of Eichmann in Jerusalem and the manner in which the Holocaust was carried out by the German state, believed that "the trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal." *Id.* at 276.

[25] For examples of IR critical theory, see *infra* Part III.A. The reference to dependent and independent variables may actually do a disservice to the theoretical thrust of this work. Indeed, many critical theorists would no doubt be uncomfortable with an essentialized concept of the "social" or "cultural" that is suggested when these are characterized simply as independent variables. The reference should be understood as figurative, useful in grasping the critique of mainstream IR realist fetishisms of the state and other positivist concepts, but in no sense imposing an endorsement of "standard" social science method or etiology. For an interesting analysis of the limitations and promise of importing formal scientific method into the field, see James DeNardo, *Complexity, Formal Methods and Ideology in International Studies*, *in* NEW THINKING IN INTERNATIONAL RELATIONS THEORY 124 (Michael W. Doyle & G. John Ikenberry eds., 1997) [hereinafter NEW THINKING].

as a non-unitary, culturally contested and socially riven locus of relations. In order to understand how foreign affairs law has arrived at its current conjuncture, and to challenge the logic that may place foreign affairs law in the service of "bad globalization,"[26] we must look precisely to examples, such as the internment, where social and cultural determinants of state action are manifest.

Of course, at a deeper level, this article is about the relationship of race and the international, race and foreign affairs, race and national security. In this context, Part IV discusses four possible models of understanding, which to varying degrees may capture the full significance of race in the "external" context. First and worst, the positivist[27] approach of IR realism shuts out analysis of actor identities, cultural and social determinants of state action and, consequently, race. Second, post-positivist IR critical theory, like other postmodernisms, effectively challenges the positivist and essentialist fallacies of IR realism and might, but need not, address the centrality of race to the field. Third is a body of legal scholarship that has linked race and foreign affairs, but in a way which may also incompletely account for race. Under this "interest convergence" model, domestic race relations respond to perceived foreign policy needs. So, for example, societal desegregation efforts in the United States are understood to have

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[26] For a critical discussion of globalization, see, for example, SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1998). Globalization may take various forms and represent the outcomes of various types of political intervention. *See id.* at xxxiv ("Globalization is a process that generates contradictory spaces, characterized by contestation, internal differentiation, continuous border crossings."). Globalization may, for example, be merely the latest variant of "first world" imperialism. See the essays collected in THE CASE AGAINST THE GLOBAL ECONOMY (Jerry Mander and Edward Goldsmith eds., 1996). For an analysis of how globalization might be useful (or hurtful) to subordinated groups such as transnational racial groups, see Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361 (1997). One might think of the imposition of exploitative intellectual property regimes by first world economic powers on "third world" producers of knowledge and culture. *See* Keith Aoki, *The Stakes of Intellectual Property Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 259 (David Kairys ed., 3rd ed. 1998) [hereinafter POLITICS OF LAW]. Alternatively, globalization may increase the potential for subordinated groups to organize effectively and challenge transnational forms of exploitation. *See generally* TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS: SOLIDARITY BEYOND THE STATE (Jackie Smith et al. eds., 1997).

[27] *See* BROWN, *supra* note 20, at 37 (defining positivism as "the belief that the facts are out there to be discovered and that there is only one way to do this, only one form of reliable knowledge, that generated by methods based on the natural sciences . . . ."). *See generally* THE CONCISE OXFORD DICTIONARY OF POLITICS 394 (Iain McLean ed., 1996) (attributing the term to French sociologist August Comte and defining it as a rejection of value judgements in social science). I define positivism here in the negative to refer to approaches that do not question the construction of basic disciplinary concepts such as state, "national interest," "security," etc. *See infra* Part III.A.

resulted from the imperatives of the Cold War, in particular the need to appear democratic before an audience of potentially alignable Third World nations.[28] Finally, I examine race internationalism and how it might inform a theory that would link race, international relations, and foreign affairs law at a more fundamental level.

The approach taken here—understanding the internment as foreign affairs law precedent—accomplishes several critical objectives. First, it reveals the flawed structures of foreign affairs law by demystifying the state and its processes in the "external" context. Second, it illustrates the socially and culturally constructed nature of the imagined external realm and suggests a possible alternative model that would combat foreign affairs law's susceptibility to capture by narrow and objectionable—e.g., racist and xenophobic—understandings of the national interest. Finally, it combats the marginalization of race in law that occurs when areas other than civil rights and discrimination law are automatically theorized as transcending, in whole or in part, the effects of racialization.

I. IR Realism as Foreign Affairs Law

This Part traces effects of IR realism in the structures of foreign affairs law. The IR realist paradigm, described briefly in general terms, can be seen at work in several conceptual formations central to the field. I will look specifically at the disciplinary tale of two precedents (*Curtiss-Wright/Youngstown*) and the "competing" models of foreign affairs constitutionalism contained therein, and at the series of constitutional "little dialectics" that site both reform and mainstream legal discourse. It should be noted that this article's discussion of the models and dialectics of foreign affairs constitutionalism is necessarily somewhat cursory. Given the particular focus of the article (internment), it has only been possible to outline in general terms the thesis of Part I, i.e., that foreign affairs law of the postwar period is largely the creature of a highly objectionable, but mostly undebated, IR realist intellectual paradigm. In the next Part, I undertake a critique of these realist underpinnings by looking "inside the state" to view the particular dynamics of internment.

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[28] *See infra* Part IV.

A. *IR Realism*[29]

International relations as a discrete intellectual discipline has existed only since around the time of the first world war.[30] Competing theories emerged in the interwar years to explain why states and their populations were drawn to fight such devastating, all-encompassing modern wars. During the 1920s a so-called liberal or utopian variant of internationalism held sway and reasoned that if the security of states could be assured, for example through organizations of collective security such as the League of Nations, the underlying commonality of interests shared by the world's peoples would emerge as a dominant force guiding states' conduct.[31] There was a faith that once structural and political barriers were removed, rational actors would begin the natural process of cooperatively pursuing their interests and creating stable and peaceful interstate relations and economies.[32]

By the 1930s, however, political events seemed to strain the credibility of liberal-utopian internationalism. Militaristic and expansionist

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[29] I collapse so-called neorealist and realist approaches under the shorthand "IR realism" primarily for purposes of verbal economy. Many would no doubt object that such a collapsing is not warranted analytically. Furthermore, some would claim that I unduly obscure the distinctness of a third mainstream school of international relations thought—liberalism/pluralism. *See infra* text accompanying notes 39–59. However, from a critical perspective, neorealism and liberalism/pluralism may not in fact present a substantial move beyond the positivist framework of realism. *See* Jim George, *International Relations After the Cold War: Probing Beyond the Realist Legacy, in* CHALLENGING BOUNDARIES: GLOBAL FLOWS, TERRITORIAL IDENTITIES 33, 44 (Michael J. Shapiro & Howard R. Alker eds., 1996) (characterizing as "illusory" progress in the development of realist thinking usually attributed to the neorealist work of the 1970s and 1980s and arguing that "for all its developmental claims to the contrary, International Relations in the 1990s remains fundamentally incarcerated in the positivist-realist framework that characterized its understanding of the world 'out there' in the 1940s and 1950s"); Steve Smith, *The Self-Images of a Discipline: A Genealogy of International Relations Theory, in* INTERNATIONAL RELATIONS THEORY TODAY 1, 20 (Ken Booth and Steve Smith eds., 1995) (arguing that despite the disciplinary narrative of competing paradigmatic "debates," most IR theory remains realist).

[30] *See* BROWN, *supra* note 20, at 21; Miles Kahler, *Inventing International Relations: International Relations Theory After 1945, in* NEW THINKING, *supra* note 25, at 20, 20. The "disciplinary home" of international relations has been in the United States, Canada, and Western Europe. *See* Kahler, *supra* at 21.

[31] *See* BROWN, *supra* note 20, at 22–26. *But see* Kahler, *supra* note 30, at 23–24 (arguing that early liberal theorists have been falsely portrayed as "idealists" who believed interdependence would insure peace). For an account of the contradictions inherent in liberal institutionalism of the period, see David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

[32] *See* BROWN, *supra* note 20, at 22–26. This thinking parallels to an extent liberal international economic theory that uses concepts such as comparative advantage and Pareto optimality to argue for freer trade and open markets in order to unleash "natural" economic forces that would tend toward "welfare maximization." For an account of the relationship between economic and international legal theory of the period, see Nathaniel Berman, *Economic Consequences, Nationalist Passions: Keynes, Crisis, Culture and Policy*, 10 AM. U. J. INT'L L. & POL'Y 619 (1995).

regimes in Japan, Italy, Spain and Germany came to be explained by so-called realist approaches that rejected the assumptions of liberal and utopian theories. IR realism, again not be confused with legal realism,[33] began to develop and entrench its classical understanding of an international system of unevenly situated actors—states competing for scarce resources.[34] In this form, IR realism denied the basic liberal premise that enlightened self-interest could lead to international cooperation, stability and welfare maximization. Instead, IR realists assumed that the essentially anarchic structure of the international system forced egoistic state actors to rely on self-help in pursuing a narrowly defined set of interests.[35] Raw power and the possibility of stability through a "balance of power,"[36] not through some underlying commonality of interest, were seen as the primary determinants of international order.[37]

Classical IR realism dominated the field of international relations throughout the interwar and early postwar years. The earlier debate was replayed in the 1970s and 1980s in slightly different terms when so-called neorealists[38] defended the realist paradigm against reformu-

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[33] *See supra* note 20.

[34] For works in the classical realist tradition, see, for example, E.H. CARR, THE TWENTY YEARS CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1939) (responsible for defining the terms of realism and its "other," utopianism); HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1948) (containing an early systematic rendering of realist theory). *See also* GEORGE KENNAN, AMERICAN DIPLOMACY, 1900–1950 (1952) (bemoaning the constraining effect of public opinion on the executive and professional class to face the perils of the external realm); HENRY KISSINGER, DIPLOMACY (1994); MARTIN WIGHT, POWER POLITICS (1946) (analyzing the failure of the League of Nations to affect international anarchy). For an interesting attempt to rehabilitate early realism by putting its classical texts through a "rhetorical turn," see the essays collected in POST-REALISM: THE RHETORICAL TURN IN INTERNATIONAL RELATIONS (Franscis A. Beer & Robert Hariman eds., 1996).

[35] *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 106–07 (1979).

[36] *See id.* at 170–71.

[37] *See* BROWN, *supra* note 20, at 32–33. For a summary of IR realist theory—consistent with the conclusions drawn here—and its consequences for law, see Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993). *See* Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1999–2000 (1993) (book review) ("Political realists accept a model of states as unitary actors whose external behavior is unrelated to internal structure and purpose. Regardless of domestic political, economic, or social configuration, states' relations with one another revolve around the struggle for power. When translated into law, realism argues for a radical break between domestic and foreign affairs.").

[38] For works in the neorealist tradition, see WALTZ, *supra* note 35 (the leading neorealist text, integrating into the realist paradigm economic modes of analysis, in particular rational choice theory); NEOREALISM AND ITS CRITICS (Robert O. Keohane ed., 1986) (containing neorealist texts and responses by critics); HEDLEY BULL, THE ANARCHICAL SOCIETY (1977) (exemplifying the so-called English School which is considered a variant of neorealist thought because of its statist focus, although these approaches also posit the existence of an international *society* of

lated liberal-pluralist theory.[39] Liberal-pluralist (later neo-liberal) theory challenged the more extreme tenets of realism, in particular the thesis that states acted in utter isolation from one another.[40] Nevertheless, neorealists continued to assert the primacy of states and structural, systemic factors in international relations,[41] leading to the retention of the understanding of states as unitary and primary actors in an anarchic international system.[42]

Liberal-pluralists argued that even assuming the rational-egoist nature of states, some degree of cooperation could be expected, at least some of the time, if only out of pure self-interest.[43] Thus, the analytical spotlight was placed on how international institutions—formal organizations such as the International Labor Organization, NATO or less formal alliances (regimes) such as those that seemed to unite liberal democratic states in the so-called "democratic peace"[44]—might bring about a degree of collective action.[45] For example, an international organization could lower "transaction costs" of cooperation or otherwise help to overcome the game theoretical problems of "prisoners' dilemma" and "free riding."[46] Significantly, however, liberalism did not alter the core assumptions of realist models.[47] States remained as the

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states). *See generally* BARRY BUZAN, ET AL., THE LOGIC OF ANARCHY: NEOREALISM TO STRUCTURAL REALISM (1993); ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS (1981); JOEL ROSENTHAL, RIGHTEOUS REALISTS: POLITICAL REALISM, RESPONSIBLE POWER, AND AMERICAN CULTURE IN THE NUCLEAR AGE (1991); MICHAEL J. SMITH, REALIST THOUGHT FROM WEBER TO KISSINGER (1986).

[39] *See* BROWN, *supra* note 20, at 45–49. For a brief overview of pluralist and neoliberal theory, see *infra* text accompanying notes 43–49.

[40] *See generally* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INDEPENDENCE: WORLD POLITICS IN TRANSITION (1977); INTERNATIONAL REGIMES (Steven D. Krasner ed., 1983).

[41] *See generally* WALTZ, *supra* note 35.

[42] For neorealists, moving past the systemic and structural level, for example to examine the role of substate actors, is to engage in "reductionist" thinking. *See id.* at 18–20.

[43] *See* Kahler, *supra* note 30, at 32–38.

[44] *See generally* BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993).

[45] *See, e.g.*, Robert Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379 (1988); Steven Weber, *Institutions and Change*, *in* NEW THINKING, *supra* note 25, at 229.

[46] *See* BROWN, *supra* note 20, at 49–50; Kahler, *supra* note 30, at 33; Peter J. Katzenstein, *Introduction: Alternative Perspectives on National Security*, *in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 1, 19 (Peter J. Katzenstein ed., 1996) [hereinafter CULTURE OF NATIONAL SECURITY].

[47] *See* BROWN, *supra* note 20, at 49 ("The pluralists of the 1970s mostly became the 'neoliberal institutionalists' of the 1980s and 1990s, and in the process came rather closer to neorealism that [sic] might have been expected. . . . They accepted the two basic assumptions of international anarchy and the rational egoism of states . . . ."); Richard Ashley, *The Poverty of Neorealism*, 38 INT'L ORG. 225, 227 (1984) (finding similarities between various post-classical realist thinkers, including those such as Keohane, who are normally identified with neoliberalism); Joseph Grieco,

primary actors in an essentially anarchic, crisis-prone international system, and the underlying identity and interest formation processes of these supposedly unitary actors remained undertheorized.[48]

The particularly statist focus of both IR realism and its liberal challengers produces several important conclusions regarding the nature of international relations. First, state interests are assumed to exist, and "states-as-subjects"[49] are expected to, and indeed are justified in, pursuing these interests in egoistic fashion. Intra-state interest formation processes, which are arguably contingent upon social and culturally constructed processes and actor identities,[50] are not analytically relevant.[51] Second, since the international system comprises a multiplicity of unitary and mostly isolated state actors in an anarchic structure, the formation and functioning of global community or interna-

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Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 INT'L ORG. 485, 486–87 (1988) (noting that neoliberals accept the basic realist premise of anarchy and state egoistic rationalism); Smith, *supra* note 29, at 20.

[48] *But cf.* Burley, *Are Foreign Affairs Different?*, *supra* note 37, at 2001 ("In a nutshell, liberalism looks beyond states to individual and group actors in domestic and transnational civil society; emphasizes the representativeness of governments as a key variable in determining state interests; and, focuses less on power than on the nature and strength of those interests in international bargaining."). This description suggests perhaps more openness in the liberal paradigm to identity and social construction in international relations than may be warranted. *See* Marysia Zalewski & Cynthia Enloe, *Questions About Identity in International Relations*, *in* INTERNATIONAL RELATIONS THEORY TODAY, *supra* note 29, at 279, 296–97 ("[T]he positivist underpinnings of pluralism [the liberal paradigm] make it doubtful that there would be any space for theorizing about the construction of gender identity or sexual identity or racial identity and the enactment of international events and processes.").

[49] *See* E. FUAT KEYMAN, GLOBALIZATION, STATE, IDENTITY/DIFFERENCE: TOWARD A CRITICAL SOCIAL THEORY OF INTERNATIONAL RELATIONS 56–57 (1997). Keyman has summarized the state-as-subject problematic:

> [I]nstead of taking the state as an object of theoretical inquiry, international relations theory has tended to conceive of it as the main actor, as an ontological entity, as an observable given institutional entity. . . . [I]t reduced the state to the decision-making process, whereby, the only objective was to maintain national interest defined as "the struggle for national power." . . . [T]he decision-making process is considered to be independent from the domestic society . . . . The autonomy from and the externality to domestic politics, which realism accords to the state, and its ahistorical primary function, the struggle for national power, makes the state an unproblematic entity, an ontological given . . . .
>
> In this context, the state does not need to be theorized, because it speaks for itself—just as the facts do in positivism. Thus, the state is taken for granted, no theoretical question is raised about its precise nature, as well as about the basic characteristics of the social formation in which it is embedded.

Id. (footnotes omitted).

[50] *See infra* Part III.A.

[51] *See* Ronald L. Jepperson et al., *Norms Identity, and Culture in National Security*, *in* CULTURE OF NATIONAL SECURITY, *supra* note 46, at 33, 43; Zalewski & Enloe, *supra* note 48, at 294–301 (discussing the insufficiencies of international relations theories in conceptualizing identity questions as they relate to the field).

tional society is unlikely and, theoretically, of little significance.[52] Third, "security" concerns are presumed to drive state action.[53] States face a perpetual security dilemma because each individual state's security depends on it maintaining the relative insecurity of other states, which will in turn strive to maximize their own security, and so forth.[54]

Finally, the realm of international relations is treated as categorically distinct from the internal political life of states.[55] In the (western) domestic "political" realm, for example, particularized interests are thought to compete for ascendancy within a liberal democratic system governed by the rule of law, constituting an "authentic politics within."[56] In the external realm of "relations," the unitary state and conditions of anarchy supplant pluralistic liberal politics and, to a large extent, the rule of law. As such, "relations" reflect the realist ontologi-

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[52] *See* Katzenstein, *supra* note 46, at 12.

[53] *See* BROWN, *supra* note 20, at 47. Recently, conceptualizations of security have been expanded beyond military security to countenance "threats" to the state arising from environmental dangers, migration flows, terrorism, trade in narcotics, economic globalization and even loss of national identity. *See, e.g.*, Barry Buzan, *New Patterns of Global Security in the Twenty-First Century*, 67 INT'L AFF. 431 (1991); Simon Dalby, *Contesting an Essential Concept: Reading the Dilemmas in Contemporary Security Discourse, in* CRITICAL SECURITY STUDIES 3 (Keith Krause & Michael C. Williams eds., 1997); Theodore C. Sorenson, *Rethinking National Security*, 69 FOREIGN AFF. 1 (1990).

[54] *See* Ken Booth, *Security and Self: Reflections of a Fallen Realist, in* CRITICAL SECURITY STUDIES, *supra* note 53, at 99, 107–08. This line of realist reasoning coincided with a uniquely American apocalyptic and "paranoid style" of politics during the Cold War which imagined the state in perpetual crisis mode. *See* Richard Hofstadter, *The Paranoid Style in American Politics, in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 23 (1965); *see also* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1400–03 (1989) [hereinafter Lobel, *Emergency Power*].

The United States continues to see itself in perpetual crisis mode. A recent example of the paranoid style and permanent crisis mode thinking involves the "war on terrorism" that the United States "escalated" with the bombings in August 1998 of targets in the Sudan and Afghanistan. Secretary of State Madeleine Albright predicted a protracted war against terrorism. *See The "War of the Future": United States Bombardment of Sudan, Afghanistan*, THE NATION, Sept. 21, 1998, at 6. Later, it was learned that the bombed pharmaceutical plant in the Sudan, thought to be producing weapons of mass destruction, was probably just a pharmaceutical plant. *See* Karl Vick, *Many in Sudan Dispute Plant's Tie with Bomber*, WASH. POST, Oct. 22, 1998, at A29; Steve Chapman, *Doubts Continue to Grow About Sudan Raid*, CHI. TRIB., Nov. 1, 1998, at 23. *See generally* Illeana Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119 (examining how the hyperbolic imagery of "terrorism" underwrites extraordinarily violent responses by states).

[55] This last point is important in that it may explain why international relations has been particularly resistant to post-positivist ("postmodern") types of inquiry that have flourished in branches of the social sciences focusing on "domestic" affairs. Such "post-approaches" have met with some acceptance but also much hostility and rejection among international relations scholars. For a telling anecdotal account of the sometimes lukewarm or hostile reception to new IR approaches by the mainstream, see Peter J. Katzenstein, *Preface* to CULTURE OF NATIONAL SECURITY, *supra* note 46, at i, xiii.

[56] *See* R.B.J. WALKER, INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY 20–21 (1993).

cal bias against "utopian" visions of world community and liberal world politics.[57] Figures (1) and (2) provide graphic depictions and brief prose descriptions of, respectively, liberal domestic and IR realist "external" models of political organization and law.[58]

B. *IR Realism as Foreign Affairs Law*

The worldview of IR realism has permeated disciplinary boundaries and conditioned legal liberalism's engagement of foreign affairs issues. The IR realist attitude can be discerned in the discipline's de-emphasis of traditional domestic public law concerns regarding the need to constrain—through rights, balancing and separation—the Hobbesian tendency to abuse institutionalized forms of power. Instead, the struggle of all-against-all is projected outward onto the international realm with each nation state, in the "mere space of relations between states,"[59] constituting a unified actor perpetually pitted against similar units in a survival struggle.[60] This notion of the survivalist state-as-subject in the realm of anarchic relations is a condition of possibility for postwar foreign affairs jurisprudence.[61]

The discussion below will trace the effects of IR realist ontology in the foreign affairs and national security law context. Generally, disciplines treat core concepts as objectively existing, thus affording them ontological status. The critique of such ontological privileging that I favor does not see an endgame in the claim that there is no objectively verifiable reality on which to apply the (admittedly flawed) tools of the scientific method or, for that matter, the insights of critical

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[57] The terminology becomes confusing here for those familiar with foreign affairs law. Foreign affairs jurisprudence characterizes certain areas as "political questions," or as being within the proper purview of the "political branches." *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (characterizing foreign affairs as an area frequently beyond the appropriate reach of judicial review). *See infra* Part II.B.2.c. This categorization parallels the politics/relations dichotomy of IR realism. The use of the terms "politics" and "political" varies in the two cases, but the general demarcation of a zone that is outside normal liberal political and legal theory is consistent.

[58] *See* Appendix at the end of this article. Figures (1) and (2) are meant only as crude aids in visualizing the distinct ontological frameworks operating in the domestic and external contexts, and no claim to underlying theoretical comprehensiveness is implied. Figure (3) *infra* depicts an alternative transnational ontology in similar diagram form.

[59] *See* WALKER, *supra* note 56, at 20.

[60] *See* James Der Derian, *The Value of Security: Hobbes, Marx, Nietzsche, and Baudrillard, in* ON SECURITY 24, 30 (Ronnie D. Lipschutz ed., 1995) (discussing Hobbes' theory of domestic peace bought at the price of war in the international arena).

[61] Mapping the full dimension of the nexus between IR realism and foreign affairs/national security jurisprudence is beyond the scope of this article. But see *infra* Part IV for an indication of possible future directions for developing a theory of race and foreign affairs that builds on the critique of IR realism.

theory. Instead, I want to consider the ways that the particular conceptual grid of foreign affairs law—IR realist in nature—itself distorts/constructs "reality." There are real political consequences of this ontological privileging and distortion/construction.[62] If foreign affairs law has been built up around facile and dubious assumptions of a pre-existing state-as-subject, national interest, national security, etc., then various disciplinary methods of rationalizing the current status quo should be questioned as well.[63] In beginning this tracing process I will look at two main problem-framing discourses: constitutionalism and the "little dialectics" of foreign affairs law.

By working from a genealogical notion of precedent I am able to conclude that scholars have been remiss in their focus on the models of *Curtiss-Wright* and *Youngstown* and the "little dialectics."[64] The internment cases, in particular *Hirabayashi v. United States*[65] and *Korematsu v. United States*,[66] which happen to fall chronologically about midway between *Curtiss-Wright* and *Youngstown*, deserve a much more significant, if not "leading," role in the foreign affairs law plotline because they reveal the inadequacy of the discipline's IR realist-inspired conceptual and discursive framework and provide a glimpse at power relations submerged therein.

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[62] *See* George, *supra* note 29, at 33–40 (discussing the political consequences of realist issue framing and citing examples such as the Gulf War and Yugoslavia tragedy).

[63] A further step in this type of critique, but beyond the scope of this article, would be to examine the ways the legal discipline itself has constituted the IR realist ontologies, such as by institutionalizing the construct of unified sovereign state-as-subject.

[64] My notion of "precedent as genealogy," though inspired by Foucault, differs in significant ways from his conception of genealogy as antipositivist historical method. For Foucault, genealogy "entertain[s] the claims to attention of local, discontinuous, disqualified, illegitimate knowledge against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge . . . . Genealogies are therefore not positivistic returns to a more careful or exact form of science. They are precisely anti-sciences." Michel Foucault, *Two Lectures, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITING 1972–1977, at 78, 83 (Colin Gordon ed., 1980). Thus, Foucault's genealogy marked a commitment to retrieving lost "histories," such as resistances, that are suppressed and deselected in the writing of mainstream history. *See id.*

Precedent as genealogy is actually more in keeping with Foucault's project of understanding the way discourses and social practices interrelate. *See* HUNT & WICKHAM, *supra* note 18, at 5–10 (providing a brief introduction to Foucauldian thought and describing the project of placing discourse within the social field of nondiscursive practices). The discourse of foreign affairs law needs to be understood in the way it articulates with the social practices of racial domination such as those operative in the internment. In this sense, the internment is "precedent" because it contributes to a "genealogy" of this articulation.

[65] 320 U.S. 81 (1943).

[66] 323 U.S. 214 (1944).

1. A Tale of Two Precedents: Foreign Affairs Constitutionalism

It is generally taken for granted that foreign affairs and its subset, national security law, developed in the postwar period under the new requisites of Cold War international relations. The great ideological struggle between capitalism and communism, together with the permanent threat of mutual annihilation, seem to have precipitated a change in the way the government and courts construed law's role in mediating the relationship between the internal world of domestic affairs and the external world of international politics. Against this background, and operating within a liberal legal paradigm, the discipline of foreign affairs law has taken as its task the distribution and, less so, the circumscribing of crisis-driven foreign affairs power under a constitutional system of enumerated and balanced governmental powers, federalism, and individual rights and liberty guarantees. Broadly speaking, two different models of foreign affairs constitutionalism have emerged.

Curtiss-Wright and *Youngstown* are the discursive cornerstones of these respective models through which scholars have argued the legal and political controversies of the postwar period.[67] Both cases raised constitutional questions and became the occasion for members of the Court to register broad and provocative commentary on the constitutionalism of foreign affairs.[68] In the disciplinary tale of two precedents, Justice Sutherland's opinion in *Curtiss-Wright* plays the role of absolutist protagonist, asserting that foreign affairs is an area of governance literally and legally outside the Constitution[69] and favoring the Presi-

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[67] *See Curtiss-Wright*, 299 U.S. 304; *Youngstown*, 343 U.S. 579. The tale of two precedents recurs, sometimes in muted form, throughout the canon of foreign affairs law scholarship. *See, e.g.*, HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION (1990); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990); *see generally* Robert G. Kaufman, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, 8 CONST. COMMENT 321 (1991); Nathan J. Diament, *Foreign Relations and Our Domestic Constitution: Broadening the Discourse*, 30 CONN. L. REV. 911, 911–12 (1998) (characterizing the approaches of Koh and Glennon as examples of the current orthodoxy in the field and citing Kaufman).

[68] *See Youngstown*, 343 U.S. at 635–37. It should be noted, as Henkin points out, that *Youngstown* did not directly involve foreign affairs powers, at least as it was understood by the Justices. HENKIN, *supra* note 14, at 95, 378 n.24. Nevertheless, Jackson's opinion has become one of the two main models in the field.

[69] *See Curtiss-Wright*, 299 U.S. at 318. Justice Sutherland argued that:

> investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality.

Koh's focus here is on competition in national security and foreign affairs between the President and Congress,[79] but the broader meanings of the narrative are implicit in his usage. The tale conveys a choice between two apparently competing constitutionalisms. The absolutist, sovereignty-derived, and relatively unconstrained vision of governmental power to conduct foreign affairs and pursue national security is sustained by the assertion of shared "consensus about national ends." The relativized, institutionally balanced, power-enumerated and relatively constrained understanding of governmental foreign affairs power assumes dissension, allowing the Court to step in and set the proper limits and distribution of foreign affairs power. Analyses of a variety of constitutional issues, such as separation of powers between the branches of government, the scope of judicial review, and the applicability of civil rights and liberties in foreign affairs, are thought to break different ways depending on which of the two approaches is adopted.[80]

But a different reading of *Curtiss-Wright* and *Youngstown* reveals often overlooked similarities.[81] Gordon Silverstein argues that both strands of the tale share the assumption that the Constitution treats foreign affairs differently from domestic affairs.[82] Factually, *Curtiss-Wright* involved joint congressional and presidential action and is therefore not, strictly speaking, about the President's power relative to Congress, as quick comparisons to *Youngstown* might suggest.[83] Rather,

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[79] *See id.* at 67–100. Throughout the book, Koh argues that the "National Security Constitution" has developed in uneven fashion since the time of the nation's founding. Koh believes national security law as it now exists is a product of the relative political will of the three branches of government and has deviated significantly from the framers' original intent. Koh chronicles how the political branches have tussled over ascendancy in the realm of foreign affairs with each acquiring the upper hand at different times. *See id.* The courts, meanwhile, have tended toward abdicating their role as effective participants—referees as it were—in the creation of a national security regime under the legal constitutional framework. *See id.* at 134–49.

[80] Generally, relative to the *Youngstown* approach, application of the *Curtiss-Wright* model favors the President over Congress, a less robust judicial review function, and state interests over individual rights. *See infra* Parts II.B.2.a–c.

[81] *See* SILVERSTEIN, *supra* note 21, at 11.

[82] *See id.* ("If *Curtiss-Wright* definitively resolved anything, it was that the *national government*—the president *and* Congress, acting together—faced few constitutional constraints in foreign policy. . . . Reading *Curtiss-Wright* and the steel case [*Youngstown*] as opposites has led to flawed prescriptions and misunderstood signals from the Court to the elected branches of government.").

[83] In *Curtiss-Wright*, President Franklin Roosevelt had acted consistently with a pre-existing congressional joint resolution empowering the President to ban the sale of arms and munitions to countries fighting in the Chaco region of South America. *See Curtiss-Wright*, 299 U.S. at 312. In *Youngstown*, President Truman had acted *in contravention* of congressional wishes, embodied in the Taft-Hartley Act, in attempting to seize steel mills to insure that labor disputes would not

the case is a statement about the absolute nature of foreign affairs power in general. Moreover, as Silverstein points out, the *Youngstown* formula is easily used by later courts to support broad presidential prerogative, which suggests that it is not primarily a case about balancing power between the branches.[84] Silverstein's concern therefore is not that the "President is winning" the fight with Congress over foreign affairs power, but rather that the courts, even when applying the *Youngstown* formula, simply view foreign affairs as an area that is outside the ambit of normal constitutional analysis.[85] The question of how the political branches should exercise foreign affairs power is secondary to the assumption that, constitutionally, foreign affairs powers are "prerogative" and subject to a diminished set of constitutional limitations.[86] Silverstein concludes that both the *Curtiss-Wright* and *Youngstown* models create an exceptional status for foreign affairs law under the Constitution.[87]

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interfere with continued production for purposes of waging the war in Korea. *See Youngstown*, 343 U.S. at 586. Thus, the two cases deviate factually on a key aspect of the institutional balancing issue—the presence or absence of congresssional support for the President's action. The different fact patterns in the cases may better explain the divergent outcomes—presidential triumph in *Curtiss-Wright* and defeat in *Youngstown*—than the application of mutually exclusive models of foreign affairs constitutionalism.

[84] *See* SILVERSTEIN, *supra* note 21, at 176–81; *see generally* Dames & Moore v. Regan, 453 U.S. 654 (1981). The Court in *Dames* upheld the constitutionality of the President's unilateral termination of private claims that were being pursued in U.S. courts against the Iranian Government and related entities, despite the presence of congressional authorization of such suits. The case illustrates the extent to which the *Youngstown* formula has led to results that one might expect from application of the *Curtiss-Wright* model. Writing for a unanimous Court, Justice Rehnquist substantially altered Jackson's formula by shifting metaphors, from "pigeonholes" to "spectrum":

> Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown* (concurring opinion), that '[t]he great ordinances of the Constitution do not establish and divide fields of 'black and white.' Justice Jackson himself recognized that his three categories represented 'a somewhat over-simplified grouping,' and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes [referring to Jackson's three-tiered formula], but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

453 U.S. at 669 (citation omitted). *See also*, Lobel, *Emergency Power*, *supra* note 54, at 1411–12.

[85] *See* SILVERSTEIN, *supra* note 21, at 223.

[86] *See id.* ("The prerogative interpretation represents a significant change in constitutional interpretation; it created and accepted an artificial distinction between foreign and domestic policy powers that has no clear basis in the Constitution itself, and it has the potential fundamentally to undermine the whole structure of government."). Silverstein argues that the traditional interpretation, from the framers onward, has been that foreign affairs is not different from domestic affairs as far as the Constitution is concerned. *See id.* at 26–36.

[87] But arguably each does so according to a different logic. *See* Lobel, *Emergency Power*, *supra*

dent as "sole organ of foreign affairs."[70] Justice Jackson's more pragmatic, flexible and balancing approach in his *Youngstown* concurrence asserted a constitutional basis of foreign affairs authority that would address foreign affairs questions by applying a kind of sliding scale formula to such concurrently held constitutional powers,[71] reflecting the modern jurisprudential aversion to bright-line distinction.[72]

On the one hand, "political realists," often political conservatives, have favored the *Curtiss-Wright* vision, arguing that the permanent security crisis[73] of the postwar world necessitates a centralization of broad foreign affairs authority, preferably in the hands of a strong executive.[74] Under this view, the dangers of the modern world with its

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Id. Sutherland read colonial history as a continuous passing of external sovereignty—not internal sovereignty—from the British Crown to the Federal Government upon independence despite the Constitution's silence on the matter. *See id.* at 316–18. Internal sovereignty passed to the individual states which then selectively and deliberately deposited or retained certain powers flowing therefrom to the Federal Government, first under the Articles of Confederation and later under the Constitution. *See id.* Sutherland listed the powers of external sovereignty that were, in this extraconstitutional manner, vested in the Federal Government. *See id.* These foreign affairs powers included: acquisition of territory by discovery and occupation, expulsion of undesirable aliens, and entering into international agreements besides formal Art. II treaties. *See id.* at 318. Since *Curtiss-Wright*, sovereignty has been invoked, for example, as the basis for the federal power to register aliens and to regulate citizens' overseas travel and activities. *See* HENKIN, *supra* note 14, at 21.

[70] *See Curtiss-Wright*, 299 U.S. at 319.

[71] *See Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring). Justice Jackson developed a three-tiered formula for determining the constitutionality of presidential actions in situations involving concurrently held powers. Generally, the formula depended on whether or not the President acted with or without the express or implied authorization of Congress, or against the express or implied will of Congress. Presidential powers flowed and ebbed accordingly. *See id.* The institutional balancing discourse in foreign affairs has a lengthy tradition, dating back to before the exchange of letters between Alexander Hamilton (Pacificus) and James Madison (Helvidius). The Hamilton-Madison letters debated President George Washington's Neutrality Proclamation of 1793, wherein Washington unilaterally proclaimed United States' neutrality after France had declared war on England. Washington's proclamation was subsequently approved by both houses of Congress. *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 111–16 (1976); KOH, *supra* note 67, at 79–80.

[72] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44 (1987) (referring to the postwar era as the "age of balancing"); Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* POLITICS OF LAW, *supra* note 26, at 23, 32–36 (describing the modern trend and linking it to the legal realist school of thought); Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality*, 41 WAYNE L. REV. 135, 152–56 (1994) (discussing balancing approach).

[73] *See* DAVID CAMPBELL, WRITING SECURITY: UNITED STATES FOREIGN POLICY AND POLITICS OF IDENTITY 23–31 (1992) (citing and discussing numerous documents of national security from the early postwar years which scripted the perpetual state of crisis); Lobel, *Emergency Power*, *supra* note 54, at 1400–04 (outlining the state of constant security crisis in the postwar period); *see also* ARTHUR M. COX, THE MYTHS OF NATIONAL SECURITY 1–31 (1975) (describing the national security mythology of the postwar period).

[74] *See* David Cole, Youngstown *v.* Curtiss-Wright, 99 YALE L.J. 2063, 2063–66 nn.2–3 (1990)

weapons of mass destruction and intractable ideological differences call for a kind of "constitutional dictator."[75] The threatened survival of the nation legitimates near absolute freedom for those who safeguard national security from constitutional constraint. On the other hand, liberal critics of Cold War foreign policy have often advocated the balancing approach offered by the *Youngstown* vision, recoiling at the increasingly "imperial presidency"[76] and the extraconstitutional model of foreign affairs powers.[77]

Harold Koh deploys the disciplinary tale, as it is constructed around the two leading cases, in his critique of national security law and practice after the Iran-Contra scandal:

> *Curtiss-Wright* and *Youngstown* sketched dramatically different visions of the National Security Constitution. *Curtiss-Wright* was decided during the rise of the imperial presidency and the American empire. By giving constitutional legitimacy to the concept of presidential dominance in foreign affairs, it contributed forcefully to the model of activist presidency fostered by Franklin Roosevelt. The vision of *Curtiss-Wright* carried the nation through World War II, a time when the nation drew together of necessity and Congress and the president shared a consensus about national ends. The president and Congress then designed the national security system in 1947 to sustain that national consensus in the cold war years through a model of management by an institutional and plebiscitary presidency. But when President Truman used that system to extend the national security state and to lead the nation into the unpopular, undeclared Korean war, the *Youngstown* Court reaffirmed the limits that National Security Constitution placed upon his authority.[78]

(book review) (citing numerous recent commentaries by political conservatives defending executive prerogative over foreign affairs).

[75] *See generally* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948) (making the case for an expanded executive power under conditions threatening the nation's survival).

[76] *See generally* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973) (tracking evolution of the overweening executive and suggesting need to control, without weakening, the President).

[77] *See* KOH, *supra* note 67, at 212 (arguing that *Youngstown* is the "controlling vision behind the National Security Constitution" and rejecting the *Curtiss-Wright* model as inappropriate in the post-Cold War era of democratic promise in foreign affairs).

[78] *Id.* at 135–36 .

I would extend Silverstein's point even further. Consider how Jackson's *Youngstown* opinion adheres to an ontological paradigm similar to that suggested by Sutherland in *Curtiss-Wright*.[88] In *Youngstown*, Jackson wrote:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, *at least when turned against the outside world for security of our society.* But, when it *is turned inward,* not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.[89]

Jackson traffics in the realist ontology that pervades interwar and Cold War intellectual history. The "outside world," poised as a threat to security, is juxtaposed to the "inward" sphere of "our society." Jackson prescribes "indulgence" of executive action in the implicitly unlawful external realm as contrasted to the "lawful" internal realm wherein such indulgence is withheld. Interestingly, however, in cases of "rebellion," recognized in the Constitution with regard to congressional suspension of the writ of habeas corpus,[90] Jackson would collapse the external/internal dichotomy for purposes of evaluating executive authority. This collapsing of the two spheres, through the imagined rebellion scenario, into one large external realm reveals the extent to which the logic of necessity—structured in a manner that is homologous with the anarchic imaginary of IR realist ontology—drove Jackson's constitutional analysis. It would seem a stretch to extrapolate from the limited suspension of the habeas clause[91] such a broad indulgence of executive discretion in cases of internal unrest. This extrusion of the external into the internal is evident in opinions Jackson authored in other cases

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note 54, at 1399–1412. Lobel's analysis of emergency powers identifies three models that have operated at different times in U.S. history: absolutist, relativist, and classical liberal. *See id.* at 1386–92. Lobel characterizes both *Youngstown* and *Curtiss-Wright* as relativist, but sees *Youngstown* as following a legal realist logic, and *Curtiss-Wright* as forwarding an inherent power logic. *See id.* at 1406–12. Lobel's characterization essentially supports Silverstein's position by placing the supposed polar opposite precedents within the same relativist grouping. *See id.*

[88] *See supra* discussion accompanying notes 69–77.

[89] 343 U.S. at 645 (Jackson, J., concurring) (emphasis added).

[90] *See* U.S. CONST. art. I, § 9, cl. 2. Congress is also authorized to use the militia to suppress insurrections. *See* U.S. CONST. art. I, § 8, cl. 15.

[91] For an authoritative analysis of the suspension clause, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

involving imagined national security "threats" where his IR realist-informed fear of "totalitarianism" led him to adopt repressive positions.[92]

Jackson's tripartite formula, though legal realist in its balancing approach and liberal in its commitment to separation of powers, nevertheless does not escape the IR realist conceptual framework. While Sutherland's invocation of the "vast external realm" of foreign affairs in *Curtiss-Wright*[93] is the clearest importation of IR realist thinking into foreign affairs legal discourse, both constitutionalisms housed in the tale of two precedents are consistent with the IR realist ontological privileging of the survivalist state-as-subject acting in an anarchic international realm.[94]

In standard legal liberalism (domestic contexts)[95] the state and its appurtenances are ontologically subordinated to law, in particular the fundamental law of the land, which is the depository of "popular sovereignty." Both temporally and hierarchically, law precedes the state. In foreign affairs (external contexts)[96] the law is the product of, and secondary to, the state; the law is subjected to *raison d'etat.* Placing the state and the rule of law on a kind of continuum and deciding where on the continuum we wish to place ourselves based on the significance afforded an exogenous determination (external *versus* internal) is to imagine the state on a par with the subjectivity of the body politic, with "we the people." It is to imagine the state-as-subject and place beyond significant scrutiny claims made in its behalf. The stakes in such an understanding of the state are evident in the intern-

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[92] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 13, 23–25 (1949) (Jackson, J., dissenting) (favoring limitation of free speech rights when state "mastery of the streets" was at stake); Dennis v. United States, 341 U.S. 494, 568–70, 572 (1951) (Jackson, J., concurring) (favoring broad application of Smith Act's conspiracy provision that would not protect Communist plotting in "its period of incubation"). *See generally* Jeffrey D. Hockett, *Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial*, 1990 SUP. CT. REV. 257 (arguing that Jackson's experience as Chief Counsel at Nuremberg might have affected his constitutional jurisprudence, at times leading to a narrowing of constitutional liberties in the face of perceived threats to security).

[93] 299 U.S. at 319.

[94] Another way in which the choice of constitutionalisms contained in the tale has been presented has been to ask whether the rule of law stops "at the water's edge?" *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 156 (1992) [hereinafter FRANCK, POLITICAL QUESTIONS]. If it does not, does the rule of law operate in the same manner in the external as it does in the internal realm? The outcome of this framing, however, may also be prefigured by the underlying ontological structure it implies. Positing as givens the mutually exclusive (and mutually defining) realms of inside and outside, even for purposes of liberal legal analysis, risks reification of IR realist-defined political and legal parameters. For a critique of the spatial ontology of IR realism, see *infra* Part III.A.

[95] *See* Figure (1) in Appendix.

[96] *See* Figure (2) in Appendix.

ment context. Perhaps the most telling IR realist moment in the Supreme Court's internment opinions was the invocation of Charles Evans Hughes' "truism" that the power to wage war is the power to do so successfully.[97] To think otherwise would be to ignore the fact that the "national survival [was] at stake."[98] Once the appeal to IR realist-driven subjectifying survival logic is made, the legal consequences seem to follow quite automatically.

In moving toward an understanding of the significance of the internment as a model of foreign affairs constitutionalism in its own right, it bears noting that the internment Court did not rely on *Curtiss-Wright* in upholding the Government's actions.[99] This omission may of course have been inadvertent, but it may suggest a greater salience for the internment as precedential instantiation of IR realist-informed foreign affairs constitutionalism. And in one sense the internment was even "truer" to the IR realist vision than *Curtiss-Wright*, as the *Hirabayashi* and *Korematsu* Court followed the IR realist vision to its logical extremes despite glaring contradictions. For example, the asserted absolute value of successful war-making, though it obscured the fact that the "war" being waged in the internment was actually an internal one directed against an innocent racial minority group, proved dispositive of all related legal questions. The "nation's" survival struggle, though indeed compromised in a serious way when "state interests" were deemed synonymous with white interests on the West Coast, took unchallenged precedence over the Japanese American residents' well-being.[100]

Ironically, of course, the supposed anarchy of the "external" was set loose internally, having grown from conditions uniquely domestic and American. Again, rhetorically, lawless state action was characterized as necessary in light of the external threat, the chaos of the international realm. But an inversion of this relationship may better describe the state of events: internal conditions of raw racial domination and white supremacy conditioned the state's conduct in its war effort. Indeed, the mass killings by nuclear bombs dropped on civilian

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[97] *See* Hirabayashi v. United States, 320 U.S. 81, 93 (1943); Korematsu v. United States, 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring).

[98] *Hirabayashi*, 320 U.S. at 106 (Douglas, J., concurring).

[99] None of the opinions filed in either *Hirabayashi* or *Korematsu* cites to *Curtiss-Wright*. *See* Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

[100] How could the "nation," defined by the assertion of particularist, racially-contingent (white) interests, albeit rhetorically in the name of universalist, national survival, maintain a claim of unified national subjecthood? Revealed was the racial specificity of the nation and the absorption by the state of that racialized identity.

centers in Japan were directly conditioned by the racist dehumanization of Asian peoples generally, a product of *domestic* race "relations" in the United States.[101]

If we seek to construct a genealogy of foreign affairs law and its articulation with modes of social domination, it is necessary to include in our tale of precedents instances, such as the internment, where the IR realist framework, operating in full force, wears its contradictions on its sleeve. By moving beyond the *Curtiss-Wright/ Youngstown* tale we may get a more complete picture of the operative constitutionalism of foreign affairs law. In Part IV, I will return to the question of constructing a model of foreign affairs constitutionalism based upon the insights of the internment and a rejection of IR realist ontology that obscures such untoward aspects of foreign affairs legalism.

2. Constitutional Dialectics[102] of Foreign Affairs

Beyond the meta-level of constitutionalism and its "great dialectic" of *Curtiss-Wright/ Youngstown*, IR realist ontology has infused the discipline's framing of smaller constitutional questions. Along with the struggle between the President and Congress for primacy in setting foreign policy and directing the national security apparatus, two other areas receive substantial attention in foreign affairs literature:[103] the weight to be afforded individual rights and liberties[104] and the scope of judicial review.[105] Analysis of these and other questions typically has meant puzzling through dispersed and ambiguous constitutional grants of power, competing historical precedents and political philosophies, and then weighing these against modern policy imperatives. However, the particular ontology that animates these constitutional problematiques in foreign affairs discourse is seldom explored.

I will argue that a common thread connecting each of these smaller constitutional dialectics is the way in which the IR realist

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[101] *See generally* RONALD T. TAKAKI, HIROSHIMA: WHY AMERICA DROPPED THE ATOMIC BOMB (1995).

[102] Dialectic here is not used in the Hegelian sense, but merely to refer to a series of oppositions staked out in the disciplinary and jurisprudential discources of foreign affairs law.

[103] The list is not exhaustive. Other questions that have received significant attention include the role of international law and federalism in foreign affairs matters. The authoritative source on the various constitutional questions in the field is HENKIN, *supra* note 14.

[104] *See, e.g.*, HENKIN, *supra* note 14, at 283–310; Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375 (1986).

[105] *See, e.g.*, FRANCK, POLITICAL QUESTIONS, *supra* note 94; THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 849–1064 (2nd ed. 1993); HENKIN, *supra* note 14, at 131–48; CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND WAR POWERS SINCE 1918 (1989).

conceptualizations of the state and its "flesh-and-bones" complement—the nation[106]—condition legal discourse. The constitutional dialectics of foreign affairs law reflect familiar categories of analysis—separation of powers, rights jurisprudence, judicial review—but in the case of foreign affairs the conceptual framework shifts, along with the movement from "internal" to "external" ontologies. IR realist-inflected concepts of the state-as-subject, national interest, and politics/relations become the ontological engine behind the legal imagination.

Liberal reformist thinking of the postwar period has struggled on several fronts toward: correction of a perceived institutional imbalance created by the increasingly "imperial presidency" and a decreasingly assertive Congress attributed to the Cold War climate of perceived perpetual and ubiquitous threat;[107] reduction of governmental incursions in the name of national security into the private sphere of individual rights and liberties;[108] maximization of judicial review of governmental action and the interbranch struggle over power.[109] In succession, I will briefly sketch the ontological structure of the constitutional "little dialectics" that have sited these reform and corresponding mainstream discourses in the discipline, while also suggesting how the internment provides an alternative understanding of each dialectic.[110] Under-

[106] In modern political and legal theory, the concept of "nation-state" neatly conflates two arguably incommensurable categories, the political and the cultural. *Cf.* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 554 (1997) ("For the internationalist, cultural differences are best when they remain differences between or within nations and when states can be brought into relationship with one another in a regime of global governance which floats above culture."). Kennedy describes how cultural difference and identity threaten the modern internationalist liberal paradigm by revealing the imaginary nature of the order it seeks to construct—"an agnostic order, selfless, objective, faithful to all sovereign desires, respectful of all sovereign prerogatives." *Id.* I would argue that such an imagined acultural understanding also animates the foreign affairs legal paradigm, thus creating resistance to recognition of the social constructedness and cultural specificity of legal forms such as those discussed in this article.

[107] *See, e.g.*, KOH, *supra* note 67; SCHLESINGER, *supra* note 76 (tracing the evolution of the imperial presidency back to its central point of origin in foreign affairs and particularly the usurpation of Congress' power under the Constitution to declare war).

[108] *See, e.g.*, Lobel, *Emergency Power*, *supra* note 54; Miller, *supra* note 104.

[109] This has not been a universally agreed upon liberal reform strategy. Some writers favoring reform have questioned whether judicial intervention is wise since it may lead to the creation of bad precedent in cases where the judical branch, like the populace at large, may fall victim to the type of hysteria that often accompanies "security crises." *See* MAY, *supra* note 105, at 256–68 ("Such rulings weaken respect for the Court and the Constitution, which, instead of protecting rights, become apologists for their violation."); Woods, Housing Expediter v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (observing that judges were likely to fall victim to the same "passions and pressures" as the populace at large).

[110] Each of these little dialectics warrants much more exploration than I am able to undertake in this article. For now, it should suffice to suggest the general contours of my thinking on this way of tracing the effects of IR realism in the discipline's foundational face-offs.

standing and critiquing cases of governmental abuse, such as the internment, through these constitutional dialectics may be an advisable strategy since it appropriates "legitimate" legal discourse and produces a viable reform agenda that may gain a degree of acceptance within legal institutions. However, insofar as the constitutional dialectics are rooted in IR realist ontology, they make it difficult to grasp with specificity the racial and xenophobic content of the internment jurisprudence or that of foreign affairs law generally, suggesting the need for a more fundamental structural and poststructural critique as well.

a. *President v. Congress*

The literature lamenting or celebrating the President's postwar ascendancy in foreign affairs is vast.[111] Critics of the "imperial presidency" point to clear abuses such as Johnson's and Nixon's escalation of war in Southeast Asia,[112] or the Reagan administration's illegal policy of covert subversion in Central America and the Iran-Contra affair.[113] Generally, a disturbing imbalance is perceived in the executive's monopolization of power at the expense of the constitutionally prescribed role of the legislative branch.[114] Supporters of greater presidential prerogative appeal to pragmatism and the increased efficiency resulting from consolidating foreign affairs and security powers in a strong executive, to a greater or lesser extent immune from either congres-

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[111] *See generally* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1984 (Randall W. Bland et al. eds., 5th ed. 1984); KOH, *supra* note 67; ROSSITER, *supra* note 75; SCHLESINGER, *supra* note 76; SOFAER, *supra* note 71. *But cf.* Peter Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 723 (1996) (book review) ("With the end of the Cold War, Congress has become increasingly assertive on the foreign policy stage.").

[112] *See* SCHLESINGER, *supra* note 76, at 127–207 (giving the history of the President's ascendancy in foreign affairs in the postwar period through the Vietnam war).

[113] *See, e.g.*, Michael J. Glennon, *Two Views of Presidential Foreign Affairs Powers:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5 (1988); KOH, *supra* note 67, at 11–37; Anthony Simones, *The Reality of* Curtiss-Wright, 16 N. ILL. U. L. REV. 411, 423–24 (1996).

[114] *See* KOH, *supra* note 67, at 153–56. The power to declare war, for example, clearly and exclusively granted to Congress in the Constitution, U.S. CONST. art. I, § 8, cl. 11, increasingly has fallen within the scope of presidential prerogative. Even direct congressional action to reclaim this important war power—the War Powers Resolution—failed to give effect to apparent constitutional intent. *See id.* at 126–28. A partial listing of instances of the expanding executive war power would include actions related to the conflicts in Korea and Vietnam, warlike aggression authorized by the President in invasions at the Bay of Pigs, Grenada, and Panama, as well as covert activities conducted against Allende, Castro, the Sandanista regime, and Khaddafi. By the time of the Iran-Contra scandal under President Reagan, the executive's nearly unlimited authority to conduct subversive military activities around the globe had been well established. Simones points out that, more recently, courts have begun using the *Curtiss-Wright* authorization to underwrite the President's power to unilaterally interpret congressional intent behind foreign affairs legislation. *See* Simones, *supra* note 113, at 421–27.

sional or judicial intervention.[115] It is argued that the executive is uniquely situated to function in the "vast external realm with its important, complicated, delicate and manifold problems."[116]

While recent history has indeed suggested that "the President (almost) always wins in foreign affairs,"[117] a longer view of history does not consistently support this view.[118] Nor does the text of the Constitution, which lays out in a rather dispersed and unsystematic fashion the primary sources of executive authority over foreign affairs issues, guarantee a presidential victory in foreign affairs.[119] The executive powers are counterbalanced by enumerated powers of Congress, which seem on their face to be as substantial as those of the executive.[120] Neverthe-

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[115] The qualities deemed necessary for efficient handling of foreign affairs usually include: decisiveness, dispatch, secrecy, and unity. *See, e.g.*, Theodore C. Sorenson, *Political Perspective: Who Speaks for the Nation, in* THE TETHERED PRESIDENCY 3, 12 (Thomas M. Franck ed., 1981) ("Members of Congress, by definition and nature, are far more likely to take a parochial view instead of the national view that an effective foreign policy requires. They are, by duty and inclination, less likely than the president to display such executive traits as decisiveness, dispatch, unity, and secrecy—all of which are required for the conduct of foreign affairs in a dangerous, complex, and fast-changing world . . . ."); Spiro, *supra* note 111, at 725 (listing the ingredients of a successful foreign policy process as precision, flexibility, dispatch, secrecy, and leadership). *See also* Theodore J. Lowi, *Presidential Power and the Ideological Struggle over its Interpretation, in* THE CONSTITUTION AND THE AMERICAN PRESIDENCY 227, 238–39 (Martin Fausold & Alan Shank eds., 1991) (describing a growing "fast track" of powers that are better exercised by the executive where "secrecy, unilateral action, energy, commitment, decisiveness" are important and time is of the essence).

[116] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Regan v. Wald, 468 U.S. 222, 243 (1984).

[117] Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258 (1988).

[118] Prior to this more recent period it would not be incorrect to say that presidents rather consistently pressed the apparent constitutional limits of their foreign affairs powers. From Polk's initiation of a war of conquest with Mexico, and Lincoln's suspension of habeas corpus and issuance of the Emancipation Proclamation under a broad reading of commander-in-chief powers, see SCHLESINGER, *supra* note 76, at 41–43, to Theodore Roosevelt's imperial campaigns in the Caribbean and the Pacific under his theory of the president as "a steward of the people," see KOH, *supra* note 67, at 89, foreign affairs has been distinctly fruitful grounds for the assertion of executive prerogative. *See* SCHLESINGER, *supra* note 76, at 35–99. Nevertheless, *rhetorically*, presidents prior to the Cold War era adhered to the traditional interpretation of institutional balance in the conduct of foreign affairs under the Constitution. *See* SILVERSTEIN, *supra* note 21, at 62. The resulting tension between action and rhetoric was actually coherent within the classical liberal logic of formally distinct realms of legitimate and illegitimate exercises of governmental power, wherein illegitimate actions under conditions of exigency were foreseeable and quasi-systematic. *See* Lobel, *Emergency Power*, *supra* note 54, at 1392; SILVERSTEIN, *supra* note 21, at 62.

[119] Relevant constitutional clauses involving grants of power to the executive that may apply in the area of foreign affairs are: commander-in-chief, U.S. CONST. art. II, § 1, cl. 1; treaty-making, U.S. CONST. art. II, § 2, cl. 2; naming ambassadors, U.S. CONST. art. II, § 2, cl. 2; receiving ambassadors, U.S. CONST. art. II, § 3; executive-power, U.S. CONST. art. II, § 1, cl. 1; take-care, U.S. CONST. art. II, § 3.

[120] Grants of congressional power in the area of foreign affairs occur in the following clauses:

less, "talismanic" references[121] to national security and the logic of *Curtiss-Wright* by government attorneys defending presidential actions in foreign affairs[122] have become such mindless commonplace that Professor Koh describes the practice as the "*Curtiss-Wright*, so I'm right cite."[123]

The alternative offered by Jackson's *Youngstown* concurrence, praised by some as presenting the most cogent assessment of the constitutional distribution of foreign affairs powers between the political branches,[124] views the President and Congress as partners in the conduct of foreign affairs and maintenance of national security.[125] The President holds certain appreciable powers, but always under the rule of law "made by parliamentary deliberations."[126]

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providing for the common defense, U.S. CONST. art. I, § 8, cl. 1; regulating commerce with foreign nations and Indian tribes, U.S. CONST. art. I, § 8, cl. 3; establishing a uniform rule of naturalization, U.S. CONST. art. I, § 8, cl. 4; defining and punishing offences against the law of nations, U.S. CONST. art. I, § 8, cl. 10; declaring war, U.S. CONST. art. I, § 8, cl. 11; raising and supporting armies, U.S. CONST. art. I, § 8, cl. 12; providing and maintaining a navy, U.S. CONST. art. I, § 8, cl. 13; (held only by the Senate) advising and consenting to treaties and naming of ambassadors, U.S. CONST. art. II, § 2, cl. 2.

[121] *See* KOH, *supra* note 67, at 148; Zweibon v. Mitchell, 516 F.2d 594, 626–27 (D.C. Cir. 1975) (referring to the Government's use of national security as a "talisman" and war power as a "talismanic incantation").

[122] Of particular importance is Justice Sutherland's suggestion that the President is the "sole organ" in foreign affairs. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). Sutherland was in effect interpreting a speech made in 1800 by then Congressperson John Marshall from the House floor. While Marshall apparently did use the quoted language, Professor Koh points out that Marshall's quote has been taken out of its original context. *See* KOH, *supra* note 67, at 268 n.61. Koh argues that it would probably be more accurate to understand Marshall as meaning that the President is the main *conduit of communication* for the United States in its international relations. *See id.; cf.* Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 25 (1973) (pointing out that Sutherland failed to note that, in the same speech, Marshall had also acknowledged a substantial role for Congress).

[123] KOH, *supra* note 67, at 94. In its entirety, Sutherland's vision in *Curtiss-Wright* leaves many difficulties for analysis of power distribution between the political branches. For example, the extraconstitutional origin of a source of federal authority in foreign affairs cannot provide definitive guidance as to delicate separation of powers questions. *See* HENKIN, *supra* note 14, at 22. While practically any act of the Federal Government in foreign affairs could be legitimated under sovereignty doctrine, which of the political branches should actually exercise the power in a given situation remains undetermined. *See id.*

[124] *See, e.g.*, KOH, *supra* note 67, at 107–08. Henkin finds Jackson's *Youngstown* concurrence less praiseworthy. Henkin argues that it leaves unanswered questions of how exactly to divide up concurrently held presidential and congressional powers and that it was written from the perspective of the President. *See* HENKIN, *supra* note 14, at 95.

[125] However, Jackson's analysis hinged on such slippery concepts as a "zone of twilight," in which constitutional allocation was unclear and probably defaulted to the President, and "implied will" in cases where congressional inaction might be viewed as tantamount to acquiescence. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); HENKIN, *supra* note 14, at 94–95.

[126] *See Youngstown*, 343 U.S. at 655 (Jackson, J., concurring) ("With all its defects, delays and

In the end, the constitutional President/Congress debate has devolved into a non-legal utilitarian choice between necessity and balance, and the courts have become increasingly content to let the President and Congress fight it out.[127] The literature treats the conflict between the two political branches as a kind of inter-branch Hobbesian struggle. Edward Corwin states the position well:

> What the Constitution does, *and all that it does*, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other powers on Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is *left for events to resolve.*
>
> All of which amounts to saying that the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is *an invitation to struggle* for the privilege of directing American foreign policy.[128]

Corwin's "invitation to [a] struggle" that shall be "left for events to resolve" reflects the tone of much of the discourse around the President/Congress debate.

Ironically, however, in an area where the dominant discourse has itself deconstructed the presumed dichotomy of law and politics—admitting that the separation question in foreign affairs is mostly political after all—there has been an "enervation of the constitutional foreign policy debate."[129] In other words, while foreign affairs have been the

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inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."); *see also* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 469–72 (1996) (citing and discussing cases establishing that the President is under the rule of law).

[127] *See* MAY, *supra* note 105, at 261–68 (characterizing judicial intervention as caught between the Scylla of "ritualistic approval" and the Charybdis of the political question doctrine, both of which undermine the concept of judicial review).

[128] CORWIN, *supra* note 111, at 201 (first emphasis in original; other emphases added); *see also Youngstown*, 343 U.S. at 654 (Jackson, J., concurring). Jackson stated:

> I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

Youngstown, 343 U.S. at 654 (Jackson, J., concurring).

[129] *See* Diament, *supra* note 67, at 912. A recent illustration of this point is provided by the bombing of "terrorist positions" in Afghanistan and a pharmaceutical plant in the Sudan. The bombings received immediate, almost universal bipartisan support, even though Congress was deeply split by the Monica Lewinsky scandal, and many believed the President had ordered the bombings to distract the public's attention. *See* Todd S. Purdum, *U.S. Fury on 2 Continents:*

main area excepted from standard review by courts because it is eminently political, it has also been the realm of degraded political deliberation.[130] The explanation for this paradox lies in the nature of the national interest that drives the "political" process regarding external matters. This national interest is not the product of dialogic deliberation as envisioned by, for example, neorepublicanists.[131] Rather, it is the untroubled unitary national interest of IR realism. Both Congress and the President are presumed to have proper and transparent linkages to this preformed national interest. The President/Congress face-off is merely a dispute over which branch will metonymically represent that uncomplicated interest and its uncompromising pursuit.

Another way of understanding my point is to view the dialectic of President versus Congress, which consumes so much of the critical discourse in the field, as actually constituting one side of a broader unstated dialectic. Regardless of which branch of government should be, or is, empowered to act in foreign affairs contexts, we could ask from what source flows the power to act imperiously. The President/Congress dialectic begs this question, assuming that the nation, endowed in a bootstrap manner with the characteristics of sovereignty, must possess this imperialist power as a right. Writers such as Jules Lobel, to the contrary, would have us challenge the imperialist impulse and content behind the legal process of foreign affairs and, in particular, national security law.[132] Moreover, the actual *non*-unitariness of the

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Congress; Critics of Clinton Support Attacks, N.Y. TIMES, Aug. 21, 1998, at A1, *available in* LEXIS, News Library, NYT file.

[130] *See* Andrew M. Lichterman, *Social Movements and Legal Elites: Some Notes from the Margin on The Politics of Law: A Progressive Critique*, 1984 WIS. L. REV. 1035, 1053 (book review) (1984) ("The 'National Security State' and the industrial apparatus that supports it exist largely outside both the conventional market and the arena of political debate."); *see also* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 154–227 (1998) (describing the onset of a "culture of secrecy" after World War II that precluded public debate of most foreign affairs issues; and arguing for a new "culture of openness" where public analysis of foreign affairs issues replaces secrecy).

[131] *See* Diament, *supra* note 67, at 945–50 (discussing the possibility of a neorepublicanist foreign policy that would be pluralistic, dialogic, and deliberative). I would further trouble the national interest concept, even beyond its neorepublican variant, in order to combat the epistemological straightjacket national interest discourse imposes. Other criticisms of the national interest concept take issue with the moral framework it implies, wherein the state is the proper unit of moral analysis in foreign affairs, and the well-being of those outside the unit is given little or no moral weight in setting policy. *See generally* W. DAVID CLINTON, THE TWO FACES OF NATIONAL INTEREST 35–46 (1994) (citing various critics and critiques of national interest concept).

[132] *See* Lobel, *Emergency Power*, *supra* note 54, at 1426 ("Revitalizing the liberal legal paradigm requires a substantive redefinition of United States national security that does not necessitate the present imperial responsibility which inevitably leads to continued crisis."); *see also* Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 502 (1993) ("To be relevant as a liberation practice, legal theory

national interest, asserted by anti-IR realist theorists,[133] renders the fixation on the President/Congress dialectic problematic, indeed, depoliticizing in the way it masks the often chasmic divergences between groups' perceptions of the national interest.[134]

The limitations of the President/Congress dialectic are illustrated in the internment context through the Court's handling of the delegation doctrine, an area of constitutional law that has since lost currency but which was viewed as decisive in cases of the period.[135] Delegation doctrine regulated Congress' ability to delegate essential parts of the legislative function to other governmental organs and actors.[136] The delegation question sited the President/Congress dialectic in the internment cases because if it could be determined that Congress had appropriately delegated authority to regulate civilian activities to the military, then the Court would have avoided having to address the more difficult question of whether the President, acting alone, could have authorized the internment program.

Congress had approved the internment, but only in the broadest of terms.[137] Indeed, Justice Reed, considered a delegation doctrine expert, insisted that the Court's opinion in *Hirabayashi* not contain any false implication that Congress had acted directly to approve the curfew orders that were litigated in the case.[138] Further, any congressional delegation to the military command of regulatory power over civilians occurred in a highly atypical manner. Virtually no open political deliberation of the program took place. The decision was taken by the military upon its own determinations, which Congress neither prescribed nor reviewed.[139] Yet, the Court approved the military's program despite clear indications that the legislative function had not been effectively performed.[140]

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must help us understand in some detail the ways in which the symbolic/analytical structure of law as a system of meanings—of practical reason and reasoned justification—participates in maintaining the material structures of power.").

[133] *See infra* Part III.A.

[134] *See infra* Part IV for a discussion of African Americans' unique positionality vis-à-vis U.S. foreign affairs.

[135] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935) (invalidating part of the National Industrial Recovery Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (invalidating entire National Industrial Recovery Act); *see generally* Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657 (1988).

[136] *See* Dripps, *supra* note 135, at 657–58.

[137] *See* Hirabayashi v. United States, 320 U.S. 81, 91 (1943).

[138] *See* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 236 (1983) [hereinafter IRONS, JUSTICE AT WAR].

[139] *See Hirabayashi*, 320 U.S. at 103–04.

[140] *See id.* at 104 (asserting that "[t]he Constitution . . . does not demand the impossible or the impractical").

The Court thus ignored the potentially dispositive question of power separation and enumeration and acquiesced in the haphazard handing over of legislative and enforcement powers to the military.[141] In effect, the Court worked backwards from the assumption of the absolute nature of the war power,[142] not forward from the actual actions of the political branches and the requisites of constitutional separation doctrine. As a result, the Court placed the fate of the Japanese Americans in the hands of a small group of military functionaries and a racist General, in clear circumvention of the political process and any protections it might have afforded the targeted minority group.[143] The assumption by the Court of an absolute power to act against a racialized civilian minority in the name of war, implicit in its avoidance of the delegation question, and the highly particular, distinctly non-unitary nature of the "national interest" pursued in the internment, point up the imperial potential that inheres in an IR realist-informed President/Congress dialectic which is allowed to frustrate critical discourse.

b. *The Individual v. State Interest*

Liberal reformers look to the individual protections of the Bill of Rights for a constraining logic to use against the government's exceptional foreign affairs powers. The individual versus state interest[144] dialectic would thus become the focal point of a liberal legal campaign to revive the rule of law when the government claims to be acting in relation to the external realm.[145] Neither *Curtiss-Wright* nor *Youngstown* involved a classic confrontation pitting individual political and civil rights and liberties against state foreign affairs or security interests, and

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[141] *See* Eric K. Yamamoto, *Korematsu Revisted—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review*, 26 SANTA CLARA L. REV. 1, 22–23, 22 n.80 (1986) (pointing out the exceptional handling of the delegation question in *Hirabayashi* when compared with then recent precedent).

[142] *See Hirabayashi*, 320 U.S. at 93.

[143] *See infra* Part II.

[144] The actual rhetorical form most often used is "national interest." For reasons of consistency and simplicity I will refer to state interest, but references to the "nation" are precisely the point in an important way. Nation signifies the cultural, *organic* unity or body over against which the individual is placed. Especially prevalent in foreign affairs contexts, this slurring of the political and cultural/organic underwrites the doubling process (described in the text) by departing from the standard liberal structure of the (political) state versus the individualized modern subject.

[145] In *Reid v. Covert*, the Supreme Court held that the Constitution applied extraterritorially in the criminal trial of a U.S. civilian. 354 U.S. 1 (1957). However, more recently the Court has limited the *Reid* doctrine in a case involving extraterritorial searches and seizures. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding the Fourth Amendment did not apply to search and seizure conducted by U.S. officials at a residence in Mexico).

the tale is not understood primarily in those terms.[146] Instead, both cases involved a conflict between state power and the *commercial* interests of individuals and companies.[147] Nevertheless, examples abound in the postwar period of courts adjudicating the collision between individual civil rights and liberties and the state's interest.[148] I will briefly outline the nature of this dialectic, as constructed and given meaning in resonance with IR realist ontology.

Postwar erosions of personal liberties, undertaken in the name of state interest, are legion and well known. In a series of Supreme Court cases of the early Cold War era, communism—functionally the internal ideological equivalent of the external Soviet threat—assumed constitutionally taboo status as the Court began authorizing a regime of guilt by association: free speech[149] and association[150] restrictions, ideological grounds for deportation,[151] and loyalty oaths[152] were approved by the Court. Even a New Deal liberal like Justice Jackson underwent metamorphosis as shown by his opinions in *American Communications Ass'n v. Douds*[153] and *Dennis v. United States*,[154] classic examples of the repressive adjudicatory style of the period. In *Douds*, Jackson implicitly endorsed the guilt-by-association principle for Communists,[155] and in his *Dennis* opinion the Justice suggested going so far as to sanction, *ipso facto*, restriction of any Communist speech, whether or not it met the established "clear and present danger" standard.[156] Thus, even the most

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[146] Of course, the internment did involve individual rights and liberties, and scholars have analyzed it from that perspective. *See, e.g.*, Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 490 (1945) ("All in all, the internment of the West Coast Japanese is the worst blow our liberties have sustained in many years.").

[147] *See supra* notes 14–15.

[148] *See* HENKIN, *supra* note 14, at 283–310.

[149] *See* Dennis v. United States, 341 U.S. 494 (1951).

[150] *See* Communist Party v. Subversive Activities Control Bd. 367 U.S. 1 (1961).

[151] *See* Harisiades v. Shaughnessy, 343 U.S. 580 (1952).

[152] *See* American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[153] *See id.* at 422 (Jackson, J., concurring and dissenting, each in part).

[154] 341 U.S. at 561 (Jackson, J., concurring).

[155] *See Douds*, 339 U.S. at 423 ("[T]he Communist party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.").

[156] *See Dennis*, 341 U.S. at 570 (Jackson, J., concurring). Jackson stated:

> The authors of the clear and present danger test never applied it to a case like this, nor would I. If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late.

Id.

revered of individual rights, such as First Amendment freedoms, were truncated by the Court in light of national security demands.

To be sure, there were counterexamples from the postwar years where the Court seemingly upheld civil liberties against the government's assertion of superior state security or foreign affairs interests.[157] One of the most celebrated and critiqued cases in this line was the *Pentagon Papers* case where the Court refused to enjoin publication of defense-related documents during the Vietnam War.[158] However, the Court subsequently returned to its earlier posture[159] in cases which restricted, on ideological grounds, entry into the country by non-citizens[160] and the travel rights of citizens;[161] limited the effectiveness of the Freedom of Information Act in favor of governmental secrecy;[162] authorized prior restraint by the CIA of a former employee's publications;[163] and, in a case similar to *Pentagon Papers*, enjoined publication of a magazine article.[164] Recently, the military's homophobic "don't ask, don't tell" policy and its enforcement through the so-called Solomon Amendments have been rationalized through the same individual rights versus state security interest schema.[165]

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[157] *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964) (holding unconstitutional a statutory provision prohibiting members of Communist organizations from obtaining or using passports); Reid v. Covert, 354 U.S. 1, 6 (1957) (asserting that the U.S. Government may only act abroad in a manner consistent with the limits of the Constitution).

[158] *See* New York Times v. United States, 403 U.S. 713 (1971).

[159] *See* Miller, *supra* note 104, at 400 ("But [precedent shows] that the Supreme Court will interpose no barrier to realization of the goals of the National Security State. One is hard pressed to find, at *any* time in the Supreme Court's history, *any* decision upholding civil rights and liberties when important societal matters are at stake."). *But see* HENKIN, *supra* note 14, at 277–310, 280 (asserting the general applicability of individual rights to foreign affairs, but acknowledging that national interest may "weigh importantly in the balance"). *See also* Jules Lobel, *Foreign Policy and the Courts*, 3 U.C. DAVIS J. INT'L L. & POL'Y 171, 176–78, 177 n.35 (1997) (citing cases and discussing the judiciary's positive disposition to individual rights claims against government action in foreign affairs cases and the judiciary's general disinclination to apply political question doctrine in such cases). For a discussion of the history of legalized political repression in the context of recent changes in the immigration and asylum laws, see Kevin Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 841–69 (1997).

[160] *See* Kleindienst v. Mandel, 408 U.S. 753 (1972).

[161] *See* Haig v. Agee, 453 U.S. 280 (1981); Regan v. Wald, 468 U.S. 222 (1984).

[162] *See* Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981).

[163] *See* Snepp v. United States, 444 U.S. 507 (1980).

[164] *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (granting injunction against publication of article on how to build a hydrogen bomb); John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 421–26 (1993) (concluding that the courts have subsequently limited the less restrictive precedent of the *Pentagon Papers* case).

[165] For analysis of the Solomon Amendments, see *Section Newsletter*, Spring 1997 (Section on

As was the case for he President/Congress dialectic, the constraints of the individual/state interest dialectic are revealed in the broader dialectic it obscures.[166] In the foreign affairs law context, the individual takes on a meaning that is significantly different from the one it has in the domestic context. Domestically, individual rights are appurtenant to the liberal legal subject—a rights-bearing, interest-maximizing, ontologically unproblematized entity. In addition, the liberal legal subject has, under circumstances, been imbued with "groupness,"[167] in the sense of the insular minority that may not be protected in the political process.[168] "They"—insular minorities—are placed over against the "we" whose interests and values are absorbed and furthered by dominant societal and political institutions.[169] In either the hyper-individualized, or groupness-imbued form, the liberal legal subject is constituted relationally as the state's Other. Indeed, defining the individual subject over against the state is the liberal vision *par excellence.*[170]

Gay and Lesbian Legal Issues—American Association of Law Schools [SGLLI-AALS]); *"Solomon II"—Amelioration Report and Recommendations*, Sept. 15, 1998 (SGLLI-AALS). For online text of these and related documents, see <http://www.cwsl.edu/aalsqueer>. *See generally* Kurt D. Hermanson, *Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992).

[166] The individual rights focus of liberal reformist work in the field could also be challenged in the way "rights talk" has been in the domestic context. In short, the occasional civil liberties victories may effect the hegemonic absorption of political dissent. Alternatively, rights discourse may also constitute a valuable tool in the hands of oppressed groups struggling for empowerment. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). This debate may have as much salience in the foreign affairs area as it does in its purely domestic context. Here, however, I focus on the divergent operation in the domestic versus the foreign affairs context of the individual and the state as underlying concepts.

[167] Of course, the groupness element in the ontology of the liberal legal subject has become a main target of post-Civil Rights conservative jurisprudence. *See* Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective, in* POLITICS OF LAW, *supra* note 26, at 312, 318–26; *see generally* ALAN GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION (1979).

[168] *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (suggesting the possibility of "more searching judicial inquiry" when "prejudice against discrete and insular minorities" might "curtail the operation of those political processes ordinarily to be relied upon to protect" them).

[169] Judge Guido Calabresi has discussed how the United States Constitution may be attuned to the we/they dichotomy and may contain a fundamental commitment that "they," by which he means various types of outsider minorities, will be protected against the excesses of the "we." In this perspective, the symmetry proposed by so-called colorblind jurisprudence, which rejects both racial remediation and the discrimination against minorities referred to in *Carolene Products* footnote 4, is not a symmetry that must be seen as a necessary part of the United States constitutional tradition. Judge Guido Calebresi, Comments at DePaul University College of Law Endlund Scholar Reception (February 19, 1998).

[170] *But cf.* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding state anti-gay legislation). The refusal of courts to protect gay and lesbian rights reflects the limited horizon of "Others" whom legal liberalism will protect. In *Bowers* Chief Justice Burger invoked the religious and

In contrast, in foreign affairs contexts the individual subject cannot be thought of as the state's Other, even when individual rights are allowed to triumph over state interests. The ontology of the state operating in foreign affairs contexts changes the construction of the individual legal subject. In its IR realist unitary form, the state-as-subject does not admit of an internal Other. Rather, we might think of the individual subject in the foreign affairs rights-versus-state interest context as functioning as the state's *double.*[171] The practical effect of this ontological doubling will usually be the automatic aligning of that which is considered to be the individual's interest with that which is considered to be the state's interest.

A different significance results from the assertion and protection of rights in each context. On the one hand, a victory (or loss) for the individual in the foreign affairs context reflects that a point has been reached at which the state interest is deemed to have suffered (or not) through the injury that is inflicted on the individual—the individual as bearer of the state's subjectivity.[172] The individual competes momentarily against the state, but both figures operate simultaneously as the bearer of sovereignty. The assumption of a discursive, political, and legal unity—a sovereign-cum-organic state subjectivity—remains the operative principle.

In contrast, consider Professor Henkin's observation that the classical constitutional scheme for protecting individuals depended on the separation of powers system and federalist sharing of power between the states and the Federal Government.[173] The separation-of-powers based system of individual rights protection works from, and toward, an understanding of the individual as the state's Other, in danger of

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"moral" identity of the state to rationalize the Court's decision to exclude sexual minorities from consideration as sanctioned "Others" within liberal political culture. *See id.* at 196–97 (Burger, C.J., concurring).

[171] In international law this doubling has been explicit in the doctrine of state responsibility for injuries to aliens. Traditional doctrine has held that injuries to an individual alien, attributable to a host state, are deemed to have been suffered by the alien's home state. Redress is owed to the state, not the individual. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 256–57 (7th rev. ed. 1997).

[172] For example, compare cases of alleged "takings" in the foreign affairs context where individual property interests have not been deemed sufficient to override state interest (no doubling), *see* HENKIN, *supra* note 14, at 297–303, with the free speech cases where the courts have been more open to individual claims (limited doubling), *see id.* at 288. In the *Pentagon Papers* case, 403 U.S. 713, it is likely the Court would have enjoined publication of the documents if Congress had sided with the President in authorizing the injunction. *See* HENKIN, *supra* note 14, at 288. The combined effect of executive and congressional action would have defeated the doubling of individual and state interest that favored publication because state interest could only very seldom be presumed to directly contradict *both* political branches.

[173] *See* HENKIN, *supra* note 14, at 278.

falling victim to the sovereign's potential tyranny and absolutism. This system attempts to fragment state power to protect individual subjects from government abuses. This structure continues to operate into the twentieth century, even after separation of powers has receded in importance in the civil rights context, as courts have made the Bill of Rights and later amendments the "bulwark for the individual against excesses by either federal or state authorities."[174]

Thus, *Brown v. Board of Education*, for example, involved opposing the individual interests of African Americans to white interests in American apartheid that had been absorbed into the fabric of the state. As Other of the state, the Court could move to protect a racial minority's interests while essentially remaining within the established liberal ontological framework. The individual/state relationship in foreign affairs contexts cannot operate in this way, in part due to the underlying IR realist ontological structure that generates a fictional *unity* of state interest. A paradox results, of course, because this structure allows particular interests, which have been absorbed into the state's operational mode (homophobic, racist, corporate, military-industrialist, patriarchal), to triumph over other (subordinated) interests in the name of the unitary state interest. The particular interests disappear behind the fiction of a unitary community of interest. This paradox notwithstanding, the individual-as-double of this sovereign unity[175] is the only possible form "individual" rights can take in the foreign affairs realm.[176]

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[174] *See id.* at 278–79.

[175] Chief Justice Earl Warren tapped this same doubling structure in his defense of individual rights in national security contexts: "If balance we must, I wonder whether on the individual's side we might not also place the importance of our survival as a free nation. The issue, as I see it, is not the individual against society . . . ." Warren, *supra* note 12, at 200. Note, however, that Warren's doubling of individual and nation did not require a rejection of the internment. *See id.* at 192–93.

[176] One might further argue that the more recent domestic civil rights setbacks in discrimination, affirmative action, and voting rights law actually signal a change toward the individual-as-double model and a more regressive racial legalism domestically. Individuals and groups who challenge their exclusions must clear ever higher hurdles (requirement of invidious intent, particularized findings of past discrimination, disregard of systemic definitions of racism) before their injuries will be deemed sufficient to place at risk a monolithically imagined "state interest" as required to give rise to legal remediability. This standard monumentalizes, and places beyond challenge, the absorption by the state of *particularistic* interest content (whiteness, for example). The rhetoric of racial conservatives indicates a project to recapture the domestic legal and political imagination through deployment of the type of monolithic/particularist construct described in the text. Consider, for example, intensifying calls for Americanization of immigrant groups, warnings against "balkanization," and nostalgia for the imagined past where, at the vanishing point, "national" (read "racial") unity abounds. *See, e.g.*, ARTHUR M. SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (2nd ed. 1998). For a liberal variant of the same phenomenon, see TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995).

The ontology of rights in foreign affairs contexts can be viewed in both its assumptions and contradictions in the internment history. There the individual due process rights of Japanese Americans were deemed insufficient to give rise to their consideration as state-interest related. Indeed, the majority in *Korematsu* rejected the possibility that the interests of Japanese Americans could have risen to the level of state concern in the internment context by posing it as a structural impossibility: "To talk about a military order that expresses an allowable judgment of war needs . . . as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality."[177] Clearly, the individual Japanese American subjects who were deprived of their liberty and property were never to be considered as the state's double, and as the state's Other their interests could not be protected within the foreign affairs framework. As well, the presumedly monolithic nature of the unitary state is belied in the internment's historical record. The racial and economic particularism at work under the guise of state interest reveals the social and cultural constructedness of the state and its fragmentary nature.[178]

In sum, the IR realist ontology is evident in the individual-versus-state interest dialectic, even in the case of individual rights victories, and generates the figure of the individual as double of the state. Calls for reform, which often favor placing more weight on individual rights, may be insufficient because the individual's interest and the state's interest, supposedly weighed against each other, become ontologically indistinguishable through the doubling structure of IR realist-informed foreign affairs law.[179] Commentators who favor more civil liberties in the foreign affairs context may sense the ontological-structural constraints and, thus, also advocate heightened judicial scrutiny of governmental action in foreign affairs contexts when individual rights and liberty interests are involved.[180] The next section discusses how the

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[177] 323 U.S. at 224–25.

[178] *See infra* Part II.

[179] This relationship of doubling between the individual and the state is turned to critical advantage in the observation of Professor Eric Yamamoto that overemphasizing the government's need for discretion in handling national emergencies "means that the very liberties the country is attempting to defend against external threat are lost." Yamamoto, *supra* note 141, at 43. Note I am not arguing that rights are indeterminate or that rights necessarily legitimate hegemonic social orders. Rather, I am saying that rights in foreign affairs contexts reflect the instantiation of a particular ontological structure that resists progressive transformation by precluding analysis of how particular interests may be forwarded and others subordinated through the imagined unity of state interest, an imaginary that operates even in instances where individual rights are protected in foreign affairs contexts. Rights *per se* are not the problem.

[180] *See* Yamamoto, *supra* note 141, at 62 ("[E]specially in an era of expanding government control over its own citizens in response to perceived threats to national security, a constitutional

IR realist ontological framework also creates obstacles to the realization of progressive reform through enhanced judicial review.

c. *Judicial Review v. Political Branch Autonomy*

Based on the historical record, the judiciary's role in foreign affairs is, to say the least, ambiguous.[181] For the past two hundred years, through the application of various adjudicatory devices such as the political question doctrine,[182] standing, ripeness, and withholding of certiorari, courts have effectively diminished their role in foreign affairs.[183] Recently, the Court has re-embraced the view that the "vast external realm" of foreign affairs is not the appropriate place for judicial intervention.[184] In some cases, the Supreme Court has fashioned its reasoning "on the merits" to similar effect.[185] The exact parameters of judicial abdication are unclear, and there are examples of the courts asserting various forms of judicial review in foreign affairs cases.[186]

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democracy cannot afford to have its courts withdraw from their historically watchful role over the most cherished liberties of its people.").

[181] *See* FRANCK, POLITICAL QUESTIONS, *supra* note 94, at 8 (describing the varied approaches to judical role in foreign affairs as "doctrinal cacophony").

[182] *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (where the political question doctrine was viewed by Justice Brennan as being most applicable to foreign affairs contexts); FRANCK, POLITICAL QUESTIONS, *supra* note 94, at 19 ("[T]he political-question doctrine's domestic use has been virtually eradicated in recent years even as its applicability to foreign affairs has been reinforced by the courts.").

[183] *See* HENKIN, *supra* note 14, at 141–48. The stronger forms of judicial abdication in the area of foreign affairs rely on a formal reading of the Constitution, as in the case of *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), where the Court pronounced: "The conduct of foreign relations of our Government is committed by the Constitution to the [President and Congress]." *Id.* at 302.

[184] *See* Haig v. Agee, 453 U.S. 280, 292 (1981); Regan v. Wald, 468 U.S. 222, 243 (1984).

[185] *See* Justice Blackmun's stinging dissent in *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155, 188–89 (1993) (Blackmun, J., dissenting), accusing the majority of straining to sanction the President's "disregard of the law." *Compare* United States v. Alvarez-Machain, 504 U.S. 655 (1992) (validating U.S. Government's abduction of a Mexican national in Mexico for purposes of transport to United States to stand trial), *with* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE. L.J. 39, 40 (1994) (accusing the Court of lacking a "decent respect for the opinions of mankind").

[186] *See Baker*, 369 U.S. at 211–12. The Court analytically surveyed the field to support its position:

> Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Nevertheless, as Thomas Franck has argued, there is an overall trend toward judicial abdication in foreign affairs resulting from Justice Marshall's "Faustian bargain" in *Marbury v. Madison*[187] which "gave back" the judiciary's involvement in foreign affairs conflicts for a more prominent role in domestic affairs.[188] Franck identifies two types of rationalization for judicial abdication: one based on constitutional principle and a second based on prudential concerns. Put simply, abdicationist arguments based on constitutional principle assert that the Constitution grants unreviewable authority to the political branches in the area of foreign affairs.[189] Alternatively, arguments based on prudential concerns have identified four areas of tension that support the abdicationist position: foreign affairs are factually beyond the ability of courts to construe; the issues raised in foreign affairs contexts are policy-oriented, not legal; the stakes are too high, involving the survival of the nation; and the political branches are likely to ignore the courts and therein undermine the status of the judiciary.[190]

In contrast, arguments against a robust judicial review function in *domestic* affairs focus attention on the so-called countermajoritarian problem[191] and oppose supposedly undemocratic "judicial activism." These attacks seem to have proliferated in the period after *Brown v. Board of Education*.[192] The countermajoritarian problem refers gener-

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Id. at 212.

[187] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803).

[188] *See* FRANCK, POLITICAL QUESTIONS, *supra* note 94, at 10–20.

[189] *See id.* at 31.

[190] *See id.* at 45. The Court adopts such prudential concerns in its 1948 *Waterman* opinion:

> [Foreign policy decisions] are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[191] The countermajoritarian problem was first discussed as such by Alexander Bickel in 1962. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system."). The attention given to the countermajoritarian nature of the judicial function has been so intense and widespread that Erwin Chemerinsky has described countermajoritarian analysis as "the dominant paradigm of constitutional law and scholarship." Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 (1989); *see also* Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 63 (1993) (asserting that the concern over democracy's relation to judicial review has "framed the central debates in American constitutional theory during the past fifty years").

[192] 347 U.S. 483 (1954). *See* William Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 734–35 (1991) (discussing

ally to the relative democratic representativity of the political and judicial branches. Since the judiciary is the branch least affected by the electoral process, it is argued, the courts are also the least democratic branch of government[193] and thus least fit to set or challenge policy in a democratic system of governance.[194]

The general dynamic at work in the domestic context is a kind of "othering" process, whereby the political branches, by dint of their subjection to the regular electoral process, are assumed to stand in a relationship of fluid correspondence with the admittedly fragmented but majority-led body politic. The judiciary, defined over against this presumed correspondence between political organs and majority body politic, is at best an unwanted interlocutor, at worst an anti-democratic obstruction. In the foreign affairs area an othering process is also in effect, but it draws force from a different reference point, the imagined unitary state interest. In order to illustrate the contrast suggested here between the dominance of the majoritarian paradigm in the domestic context and the unitary state interest paradigm in the foreign affairs context, it is instructive to compare responses to anti-judicial review attacks in each domain.

Domestically, various theories have been devised to defend a robust judicial review function within standard liberal legal discourse.[195] John Hart Ely, in one of the more widely discussed variants, has argued that the judiciary can function effectively as reinforcer of the democratic process under consensually determined principles of the Constitution.[196] Notwithstanding his argument that judicial review is actually

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theories of judicial review in the shadow of *Brown*). For articles debating judicial review in the post-*Brown* context, see Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[193] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–75, 77–88 (1980) (arguing that the judiciary, as the least democratic branch, should limit itself to correcting manifest vagaries of the political process occurring among the more democratic branches).

[194] *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 169–70 (1980) (arguing for limiting the role of the judiciary to the protection of individual rights since the political process is sufficient to resolve issues of federalism and separation of powers).

[195] Alexander Hamilton articulates the general liberal defense of the judiciary in Federalist No. 78. *See* THE FEDERALIST NO. 78 (Alexander Hamilton). In addition to his characterization of the judiciary as the "least dangerous branch," Hamilton saw it as the ultimate people's organ, which would serve as "an intermediate body between the people and the legislature, in order to . . . keep the latter within the limits assigned to their authority." *Id.*

[196] *See* ELY, *supra* note 193, at 181.

a consent-based function, potentially a process-oriented representation reinforcer,[197] Ely absorbs the general vision of the courts' outsider status vis-à-vis the majority even as he responds to it: "Appointed judges, however, are *comparative outsiders in our governmental system* . . . . This does not give them some special pipeline to the genuine values of the American people: in fact it goes far to ensure that they won't have one."[198]

A second category of responses to the countermajoritarian critique is civic republican in nature. Frank Michelman, for example, favors a less process-based defense, presumably to insure the retention of progressive substance in any post-countermajoritarian understanding of the judicial function.[199] Civic republicanism in general would read a normative agenda ("civic virtue") into the foundation of U.S. democracy. Michelman, aware that unconstrained forms of communitarianism could well lead to repression of minority groups and views, constructs a judicial review function that retains a foundational commitment to the "virtue of plurality."[200] Moving from a notion of inclusionary plurality as foundational norm, Michelman carves out a (progressive) role for an independent judiciary in terms of insuring a legitimate norm-validating political process.[201]

Both defenses of the judicial function—Ely's liberal-pluralist, process-based defense and Michelman's civic republican, value-based defense—respond directly to the countermajoritarian discourse, and, to an extent, make no attempt to transcend it. Both make an appeal within the basic framework of domestic liberal political theory. Ely does so by problematizing the democratic validity of the imperfect, minority-silencing political process and offering the judicial function as representation reinforcer. Michelman does so by inserting inclusionary pluralism into the primary republican value-canon and setting up the judiciary as the logical political organ for maintenance of that value. In neither case does the author attempt to challenge directly the two basic premises of countermajoritarian discourse: first, that the domestic body politic is fragmented into identifiable, legally relevant "majority" and "minority" groups and positions and, second, that the judicial function should somehow be testable by the maxim of governance "by

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[197] *See id.* at 87.

[198] *Id.* at 103 (emphasis added).

[199] *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1524–26 (1988).

[200] *See id.* at 1528.

[201] *See id.* at 1526–27. Michelman's "stipulation (ii)" would protect minority groups and positions by insuring that the social and constitutional dialogue "is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom . . . ." *Id.*

the people." The liberal and civic republican defenses of the judiciary merely provide a more nuanced rendering of the maxim in its full complexity.

In contrast, Franck's defense of judicial review in the foreign affairs contexts rebuts the arguments from constitutional principle and prudential concern, but not primarily by invoking liberal democracy-based rationales. His major concern is not the asserted problematic relationship of the judiciary to the majority-identified body politic. Rather, Franck must respond to concerns that depend on a unitary understanding of state interest in the realm of international relations. Consider how Franck summarizes his defense of the judicial function in foreign affairs:[202]

> [W]hen courts do take jurisdiction over foreign-affairs cases, the costs to national policy interests are generally far less than the government may have imagined. . . . More to the point, however, when judges do decide the cases brought to challenge a foreign policy, it may safely be assumed . . . that they would reach out in an effort to agree with the story told by the president's experts. In all but the most egregious instances, they would find a challenged presidential action constitutional and legal.
>
> Thus no reasonable foreign-policy manager ought to fear the U.S. courts. . . . The costs of judicial review of such cases to presidential discretion has [sic] been vastly overstated, not least by the judges themselves.
>
> On the other hand, not to [allow judicial review] has heavy costs, precisely in the area of foreign policy. America's principle shield and sword is not the nuclear bomb but the most powerful idea in today's political marketplace. That idea is the rule of law. To make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament. It is a strategy urgently in need of judicial review.[203]

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[202] The argument from constitutional principle, i.e., that the courts are not empowered under the Constitution to review foreign affairs decisions, is not widely accepted analytically, although rhetorically it may be deployed to achieve abdication. *See* FRANCK, POLITICAL QUESTIONS, *supra* note 94, at 43–44. For analysis of the extraconstitutional model—akin to the constitutional principle argument against judicial review in foreign affairs discussed in the present section—as IR realist construct, see *supra* discussion in Part I.B.1.

[203] FRANCK, POLITICAL QUESTIONS, *supra* note 94, at 159.

In making his case for judicial review under conditions imposed by the IR realist-informed paradigm of foreign affairs, i.e., the assumption of a unitary state interest, Franck must argue that exercise of the judicial function in foreign affairs contexts will not endanger the national well-being. He seeks to assuage the fears of abdicationists by allowing that the courts would almost never question the presidential prerogative in foreign affairs, certainly never in a way that would be costly, i.e., that would jeopardize the national interest. Ultimately, he appeals to *realpolitik*, claiming a strategic significance akin to the maintenance of nuclear superiority as his defense of judicial review.

At each step, Franck's response is conditioned by the IR realist-informed paradigm that takes for granted the existence of a unitary state interest that could be threatened by an independent judiciary reviewing foreign affairs decisions. The othering process by which the judiciary is removed from foreign affairs is not primarily politico-theoretical (denying correspondence between the judiciary and the majoritarian political process), it is ontological and IR realist (denying correspondence between the judiciary and the unitary state interest). Indeed, the mere appearance of a lack of unity in the conduct of foreign affairs, which might be inferred from judicial intervention, is understood by critics to constitute a threat to the state interest.[204]

The obvious problem with the IR realist-bounded judicial review/political branch dialectic as inscribed in the disciplinary discourse (and rendered up through the tale of two precedents)[205] is that it resolves, rather automatically, in favor of the political branches in most instances. A second defect lies in the way the paradigm of unitary state

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[204] *See* Baker v. Carr, 369 U.S. 186, 281 (1962) (Frankfurter, J., dissenting) (arguing "the necessity of the country's speaking with one voice" in foreign affairs contexts).

[205] *Curtiss-Wright*, with its "sole organ" and extraconstitutional commitments, would seem to preclude courts from exercising a robust review function. *Youngstown*, with its separation/balancing logic would afford courts more or less the usual role in reviewing and interpreting government actions, at times perhaps sidestepping particularly intractable law versus politics standoffs through the use of judicial case management techniques. However, the antagonistic roles ascribed to the two cases in this dialectic are somewhat difficult to square with the actual precedent established in each case.

In effect, both cases constitute clear examples of the Court exercising its review function. In *Curtiss-Wright*, even as Sutherland wrote about the "marked difference between foreign affairs and domestic affairs," 299 U.S. at 321, and about extraconstitutional grants to the Federal Government of the powers of external sovereignty, *see id.* at 318, he was effectively exercising the Court's power of judicial review. The opinion includes pages of careful analysis of the history of joint congressional resolutions as sources of legislative delegation. *See id.* at 322–28. Sutherland thus assessed whether precedent authorized the type of combined legislative and executive action present in the case. *See id.*

interest limits a progressive or liberal response. It is difficult to mount a strong defense of judicial review in foreign affairs akin to that of Ely's or Michelman's because the paradigm of unitary state interest tends toward political absolutism.[206] Even Franck's unflinching defense of the judiciary's role resorts to a claim of strategic value for judicial review, and thus makes its appeal within an imperial and nationalist value structure, no doubt in contravention of Franck's own political commitments.

The internment experience reveals the essentially contradictory nature of the IR realist-driven judicial review/political branch dialectic. As will be explained in Part II, many of the Court's members were reticent to judge the government's and the military's actions against the Japanese American community.[207] Even Justice Jackson, in his oft-quoted *Korematsu* dissent, ultimately capitulated to the nonreviewability of state interest:

> When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . .
>
> . . . .
>
> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal.
>
> . . . .
>
> I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task.[208]

Although Jackson would not have given a judicial stamp of approval to the deportation of Japanese Americans from the West Coast,[209] he bows to the inevitability of unconstitutional governmental action in the case.

Jackson's assessment of the situation, that "the armed services must protect a society, not merely its Constitution," assumes a societal

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In *Youngstown*, both Justice Hugo Black's opinion for the Court and Jackson's concurrence left no doubt that the President's, and indeed the entire Federal Government's, exercise of foreign affairs power would be tested for constitutional legitimacy by the courts. Jackson, unsatisfied with existing precedent as a guide to conducting judicial review, attempted to set down once and for all a coherent method for assessing government actions under the Constitution.

[206] *But see* Yamamoto, *supra* note 141, at 41 (proposing a standard of judicial review that would operate despite governmental claims to military necessity or national security).

[207] *See infra* discussion accompanying notes 326–33.

[208] 323 U.S. at 244–45, 248 (Jackson, J., dissenting).

[209] *See id.* at 247 ("I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority.").

unity that somehow excludes Japanese Americans from protection. The inevitability of this paradoxical outcome results from the IR realist understanding at the heart of the judicial review/political branch dialectic. Just as President Lincoln's famous rhetorical question—"Is it possible to lose the nation and yet preserve the Constitution?"—masked the nature of the Civil War as the death of the nation and the birth of a new nation based on a different covenant,[210] Jackson's valorization of "society's protection" masked the campaign of societal destruction that actually occurred through the internment.

In conclusion, this Part has suggested that the conceptual framework of foreign affairs law—as evident in both its putatively competing models of constitutionalism and constitutional dialectics—tracks very closely with, and is fundamentally animated by, IR realist ontology. The result has been the embedding of a kind of extraconstitutionalism and statist-inspired positivism at the core of the discipline. In the next section I will use the public history of the internment to place in even sharper relief the various inadequacies and contradictions inherent in a foreign affairs law based on IR realist ontology.

II. The Internment as Foreign Affairs Law Precedent

The internment as policy and jurisprudence involved factors that simply do not appear on the radar screen of IR realism: fraud, racism (individual and systemic), white nationalism, private economic "rent-seeking," and bureaucratic dynamisms. Here, I will highlight how these factors conditioned the government's policy formation processes, intragovernmental conflict and conspiracy, and the courts' legitimation of the internment. These aspects of the internment story show linkages between actors within the state—both institutions and individuals—and the structure of foreign affairs law. Two critical insights will be developed.

First, to the extent foreign affairs law understands the state as a unitary subject, it precludes examination of the particularized motivations of potentially autonomous actors, bureaucracies, and institutions within the state. Thus, courts, political processes, media, and scholarly discourse are apt to misconstrue the factors and vectors of foreign affairs by imagining the "state-level" as the only relevant field of action. Second, socially and culturally contingent actions by intra-state actors, especially actions that are subordinationist in nature, may become

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[210] *See* Robert Meister, *Sojourners and Survivors: Two Logics of Constitutional Protection*, 3 U. Chi. L. Sch. Roundtable 121, 123 (1996) (suggesting the operation of a new anti-racist survival covenant after the Civil War).

reified through the legal process as legitimate forms of state action. Specifically, the IR realist-informed structure of foreign affairs law allows past abuses to frame future action because of its narrow and absolute statism. The latter point suggests the need for a theory of the state that takes into account how foreign affairs law may contribute to particular reifications of the state that naturalize imperial, racist, and xenophobic relations.

A. *Inside the State*[211]

The actions of various agencies and individuals combined to set in motion the "state's campaign" to intern Japanese Americans. It is widely understood that Lieutenant General John L. DeWitt bore much personal responsibility for the internment, having produced two of the key government reports that put into circulation inaccuracies and falsehoods concerning the "loyalty" of Japanese Americans living on the West Coast of the United States.[212] However, DeWitt was part of a larger circle of government actors responsible for concocting and carrying out the internment.[213] The list of players includes, among others, local and state politicians from the West Coast region, members of the War Department, Justice Department, Congress and various branches of the armed forces, as well as the President. I will only highlight a few aspects of this intricate history that are useful to the analysis pursued here.[214] Fuller versions of the history are available in the literature.[215]

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[211] I am indebted to Kitty Calavita for this section heading. Her book on the Bracero Program drew on archival materials to paint a detailed picture of the micro-levels of state action. Calavita's analysis of the institutional histories behind the Bracero Program achieves a blending of structural critique and close description that was suggestive of the approach I have taken, on a more modest scale, to the internment. *See generally* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. (1992).

[212] *See* PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 6 (Civil Liberties Public Education Fund 1997) (1982) [hereinafter PERSONAL JUSTICE DENIED or the CWRIC (Commission on Wartime Relocation and Internment of Civilians) Report]. DeWitt authorized a memorandum to Secretary of War Henry Stimson in February 1942. The CWRIC report referred to this memorandum as the final recommendation on the "Evacuation of Japanese and Other Subversive Persons from the Pacific Coast." *See id.* at 82. Apparently, Colonel Carl Bendetson, a War Department staff member, was the primary author of the memorandum. *See* PETER IRONS, JUSTICE AT WAR, *supra* note 138, at 56–60. The second source attributable to DeWitt was the so-called *Final Report.* J.L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (U.S. Department of War 1943).

[213] *See generally* IRONS, JUSTICE AT WAR, *supra* note 138.

[214] For a concise summary of the historical record focusing on the main areas of government misconduct in the internment litigation, see Yamamoto, *supra* note 141, at 8–19.

[215] In addition to the CWRIC Report, *supra* note 212, and Irons' book, *supra* note 138, the

In the ten weeks after the bombing of Pearl Harbor, a political steamroller gained momentum toward evacuating and imprisoning over 100,000 innocent Japanese Americans.[216] It would be a mistake, however, to assume that this result was inevitable. For despite the prevalence of strong racial animosity toward Japanese Americans, which had historical roots in nineteenth century anti-Asian hate movements that continued in place before hostilities with Japan heightened in the 1930s, initial public opinion among whites after Japan's attack did not suggest that concentration camps were imminent.[217] Even the *Los Angeles Times*, which would later play a key role in fanning the flames of racist hatred, initially published editorials that defended the loyalty of Japanese Americans, referring to them as "good Americans."[218] Various governmental intelligence officials, including hard-liner J. Edgar Hoover, thought it made little sense to conduct a mass evacuation and detention program of a racial minority community of innocent civilians.[219] Lawyers in the War Department, the Justice Department, and other governmental agencies openly discussed the constitutional barriers to a mass internment of civilians based on racial classification.[220] Even the overtly racist DeWitt,[221] at first, did not foresee the internment he would later conspire to create and, through a series of orders, mandate.[222]

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following works are among those that also contain important documentation, both from the perspective of governmental history and personal histories of the internees: ROGER DANIELS, CONCENTRATION CAMPS: NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WWII (rev. ed. 1989); RICHARD DRINNON, KEEPER OF CONCENTRATION CAMPS: DILLON S. MYER AND AMERICAN RACISM (1987); YASUKO IWAI TAKEZAWA, BREAKING THE SILENCE: REDRESS AND JAPANESE AMERICAN ETHNICITY (1995); MICHI WEGLYN, YEARS OF INFAMY (1976); JAPANESE AMERICANS: FROM RELOCATION TO REDRESS (Roger Daniels et al. eds., 2nd ed. 1996).

[216] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 6–7.

[217] *See id.*

[218] *See id.*

[219] *See id.* at 29. All three major intelligence units involved in investigating the activities of "fifth column" espionage, the Office of Naval Intelligence, the Army's G-2 intelligence unit, and the FBI, concluded that any threat had been eliminated after Pearl Harbor (and before Roosevelt's signing of Executive Order 9066) with the rounding up of known spies. *See id.* at 23.

[220] *See id.* at 33–37.

[221] IRONS, JUSTICE AT WAR, *supra* note 138, at 26 ("[DeWitt] complained, several weeks after Pearl Harbor, that the Army has assigned 'too many colored [African American] troops' to the West Coast in view of the 'public reaction out here due to the Jap situation.' 'I'd rather have a white regiment,' DeWitt told the Army's chief of classification and assigment, than one that included either Black or Japanese American troops.").

[222] *See id.* at 30 (reporting that DeWitt argued against the mass internment plans initially by stating the truism he would later ignore: "An American citizen, after all, is an American citizen").

The concerted efforts of a few members of the Army's legal corps, organized West Coast anti-Japanese hate groups, and a lack of courage and leadership both on the part of high-ranking civilian officials and the civil liberties establishment conjoined with the individual efforts of DeWitt to seal the fate of the internees. Peter Irons' detailed account of the internment's legal history reveals that Provost Marshal General Allen Gullion and his assistant Captain (later Colonel) Karl Bendetson convinced a reluctant DeWitt that the evacuation and internment of all Japanese Americans from the West Coast was desirable and feasible.[223] Gullion, the Army's highest ranking law enforcement official, had wished to impose martial law on the entire West Coast.[224] Meetings with West Coast political lobbyists, however, convinced him that evacuation and internment of all Japanese Americans on the West Coast would be a viable alternative to martial law.[225] Bendetson, an ambitious young officer in the Army's legal corps and liaison between his boss Gullion, the War Department, and DeWitt, "assumed an independent and aggressive role"[226] in convincing DeWitt to push the War Department to back the internment of all Japanese Americans on the West Coast. Irons concludes that "[t]he crucial role of [Bendetson] illustrates the power exercised by lower-echelon but strategically placed officials in affecting the decisions of superiors who are distracted by other duties and who are dependent on their subordinates for information and advice."[227]

Within the War Department, Assistant Secretary of War John McCloy was assigned immediate responsibility for decisions affecting Japanese Americans.[228] McCloy, a close friend of Justice Felix Frankfurter who later anchored the pro-internment majority of the Court, achieved notoriety as an attorney for the Cravath law firm in an espionage case

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[223] *See id.* at 29–32.

[224] *See id.* at 33.

[225] *See id.* at 29, 38.

[226] IRONS, JUSTICE AT WAR, *supra* note 138, at 49.

[227] *Id.* Irons does not, of course, believe Bendetson was solely responsible for keeping the internment on the government's agenda. Rather, Irons acknowledges the responsibility both of leaders for final authorization and of lower level bureaucrats who often play invisible but key roles in shaping the policy articulation processes of institutions. *See id.* at 49. Irons also discusses the role of the culture of racism toward people of Asian descent generally. *See id.* at 7–8. *But see* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1187 (1985) ("[Irons] presents history only as a product of individuals' actions, describing these events exclusively in terms of the actions of lawyers and judges. This approach to history extends particularly to his understandings of race. For Irons, racism is situated in the personal prejudices of the lawyers and officials involved.").

[228] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 15, 363.

from World War I.[229] Although McCloy worked on that case as counsel for a private litigant seeking damages for a New Jersey railyard explosion, his involvement earned him an appointment in the War Department under Secretary Henry Stimson as consultant on counterintelligence issues.[230] McCloy, at first concerned over the constitutionality of interning a racially defined class of citizens, eventually gave in to pressure over "threats" posed by the civilian Japanese American population.[231] He teamed with Gullion and Bendetson in opposing lawyers from the Justice Department who objected to plans for the internment.[232] Finally, top level Cabinet members, Stimson and Attorney General Biddle, and President Roosevelt approved or acquiesced in the internment, and Executive Order 9066[233] infamously authorized America's concentration camps.[234]

Bendetson's role is significant in that he penned many of the outrageous claims in DeWitt's final recommendation regarding the existence of security threats that allegedly derived from, in essence, genetic predispositions of Japanese Americans.[235] The report states: "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted."[236] DeWitt subsequently reiterated this sentiment in newspaper interviews, asserting "a Jap's a Jap."[237] Almost forty years later in his testimony before the congressional Commission on Wartime Relocation and Internment of Civilians (hereinafter CWRIC), Bendetson defensively cited "human nature" as the basis for his belief that Japanese Americans would have assisted a Japanese invasion of the West Coast.[238]

Bendetson's racialization of national security was given a more respectable veneer in an important memorandum to Attorney General Biddle regarding the constitutionality of the internment.[239] Perhaps sensing that both Stimson and President Roosevelt were being per-

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[229] *See id.* at 15–16.

[230] *See id.* at 16.

[231] *See id.* at 43.

[232] *See id.* at 61.

[233] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

[234] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 61–63.

[235] *See id.* at 58–59.

[236] *Id.* (quoting U.S. Department of War, *Final Report: Japanese Evacuation From the West Coast, 1942* (Washington, D.C., 1943), p. 34).

[237] *See* PERSONAL JUSTICE DENIED, *supra* note 212, at 222.

[238] IRONS, JUSTICE AT WAR, *supra* note 138, at 355.

[239] *See id.* at 54–55.

suaded to support the internment by lobbying efforts from outside and inside the government[240] and facing stiff opposition to the internment by members of his own staff, Biddle solicited legal advice from three governmental lawyers outside the Justice Department.[241] Oscar Cox, Ben Cohen, and Joseph Rauh opposed the internment but nevertheless cited racial characteristics as a distinguishing factor possibly justifying disparate treatment of Japanese Americans:[242]

> Since the Occidental eye cannot readily distinguish one Japanese resident from another, effective surveillance of the movements of particular Japanese residents suspected of disloyalty is extremely difficult if not practically impossible . . . the normal Caucasian countenances of such [German and Italian descended] persons enable the average American to recognize particular individuals by distinguishing minor facial characteristics.[243]

These and other such biologistic rationalizations would buttress the "racial characteristics"[244] prong of the government's argument in the internment cases, which asserted the inscrutability and natural disloyalty of Japanese Americans as a race.[245]

The central role of racist ideology in vicious combination with professional, economic and political ambition in the government's policy formation process is evident throughout the historical record. Consider, for example, white farmers who were in competition with Japanese American farmers and effectively pressured West Coast politicians to push for the internment in Congress. A representative of the Grower-Shipper Vegetable Association, a group supported by California Congress member Jack Anderson, stated frankly: "We're charged with wanting to get rid of the Japs for selfish reasons. We might as well be honest. We do. It's a question of whether the white man lives on the Pacific Coast or the brown man."[246]

The political leaders of the interior states also placed political considerations first, articulating and defending their constituencies' racism when they were approached by the Army and War Department on the question of "voluntary" relocation of dislocated Japanese Ameri-

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[240] *See id.* at 53, 62.

[241] *See id.* at 53.

[242] *See id.* at 54.

[243] IRONS, JUSTICE AT WAR, *supra* note 138, at 54 (quoting Memo, "The Japanese Situation on the West Coast," File 146–13–7–2–0, Records of the Alien Enemy Control Unit, DOJ).

[244] *See infra* text accompanying notes 304–33.

[245] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 138, 148.

[246] *See id.* at 39–40.

cans to their states.[247] "We want to keep this a white man's country," stated Idaho Attorney General Bert Miller.[248] Governor Nels Smith of Wyoming said the people of Wyoming "have a dislike of any Orientals, and simply will not stand for being California's dumping ground." Smith warned that allowing the dislocated to move to Wyoming would mean "[t]here would be Japs hanging from every pine tree."[249]

As well, the propaganda of hate groups was adopted by governmental rationalizers of the internment such as future Chief Justice Earl Warren.[250] Warren testified before the Tolan Committee in 1942 that Japanese American organizations were undertaking extensive subversive activities.[251] Warren's "evidence" came directly from the files of the discredited House Committee on Un-American Activities,[252] chaired by racist Congress member Martin Dies (hereinafter Dies Committee).[253] The Dies Committee in turn got the material for Warren's testimony from unverified sources, extrapolating outlandish conclusions of "anti-American" conspiracies from the most innocent of circumstances.[254] The Dies Committee's *Report on Japanese Activities* stated that "no Japanese can ever be loyal to any other nation than Japan." No "Americanization" of Japanese Americans was possible.[255] Warren's testimony is significant because it legitimized and perpetuated the otherwise dubious assertions of hate-mongering fringe groups.[256] Irons traces the various unsubstantiated conspiracy claims from obscure West Coast sources to the Dies Committee, through Warren's Tolan Committee testimony to DeWitt's *Final Report*, and the Western States' unethically

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[247] *See id.* at 71–72.

[248] *See id.* at 72 (quoting Bert Miller from Memo, "Report in Meeting, April 7, 1942, at Salt Lake City, with Governors, Attorneys General, and Other State and Federal Officials of 10 Western States," Box 8, RG 107, NA).

[249] *See id.* at 71–72 (quoting Memo, "Report in Meeting, April 7, 1942, at Salt Lake City, with Governors, Attorneys General, and Other State and Federal Officials of 10 Western States," Box 8, RG 107, NA).

[250] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 212–14; Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, in this issue, at 111–12.

[251] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 213.

[252] *See id.*

[253] *See id.* at 214 (referring to Dies as an "avowed anti-black and anti-Oriental racist").

[254] For example, from the fact that several Japanese American community groups shared mail boxes, an inference was drawn that the groups were likely involved in espionage. *See id.* at 216.

[255] *See id.* at 213–16.

[256] Of course, Warren was himself affiliated with anti-Asian groups such as the Native Sons of the Golden West and the American Legion. *See* Cho, *supra* note 250.

authored[257] amicus brief in *Hirabayashi* into the Supreme Court's deliberations.[258]

Another governmental investigative body, headed by Supreme Court Justice Roberts, who would belatedly offer a dissent in *Korematsu*, provided no documentation for its insinuation that Japanese Hawaiians committed acts of espionage in support of the Japanese bombing of Pearl Harbor.[259] Prior to Roberts' report, Secretary of the Navy Frank Knox had recklessly spread unsubstantiated allegations of Japanese Hawaiian "fifth column"[260] support for the Pearl Harbor attack.[261] CWRIC concluded that the Roberts Commission "did not use language designed to allay the unease spread by Knox."[262] Instead, the Roberts Commission report was pivotal in building the momentum toward internment.[263]

The media as well played a significant role in shaping internment policy. Columnists and editors of various political persuasions began attacking the government's initial respect for the constitutional rights of Japanese Americans.[264] Henry McLemore agitated in the *San Francisco Examiner*: "Herd 'em [Japanese Americans] up, pack 'em off and give 'em the inside room in the badlands. Let 'em be pinched, hurt, hungry and dead up against it. . . . Personally, I hate the Japanese. And that goes for all of them."[265] Walter Lippman, at the behest of DeWitt (and probably Earl Warren),[266] wrote an alarmist piece on alleged fifth column activities and urged disregard for the constitutional rights of Japanese Americans:[267] "Nobody's constitutional rights include the

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[257] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 212–18. The Western States amicus brief in *Hirabayashi* was filed jointly by the Attorneys General of California, Oregon, and Washington. However, the primary author of the brief was Captain Herbert Wenig, a staff member under DeWitt. Since the Government was a party to the *Hirabayashi* case, it was inappropriate for Wenig to have authored the amicus brief. Amicus briefs may not be prepared by participants in the underlying lawsuit. *See id.*

[258] *See id.* at 212–18.

[259] *See id.* at 40.

[260] *See id.* at 21 (explaining origin of the term "fifth column" in the Spanish Civil War where General Franco's civilian sympathizers constituted a fifth column, which augmented the four columns of troops Franco led in the march on Madrid).

[261] *See* PERSONAL JUSTICE DENIED, *supra* note 212, at 55–56.

[262] *Id.* at 58.

[263] *See id.*

[264] *See id.* at 71–72.

[265] *Id.* at 72.

[266] *See* Cho, *supra* note 250.

[267] *See* PERSONAL JUSTICE DENIED, *supra* note 212, at 80; IRONS, JUSTICE AT WAR, *supra* note 138, at 60.

right to reside and do business on a battlefield [sic]."[268] Lippman's column became a jumping off point for other voices of repression such as Westbrook Pegler who referred to Lippman's piece in concluding: "We are so dumb and considerate of the minute constitutional rights and even of the political feelings [of the Japanese Americans]. The Japanese in California should be under armed guard to the last man and woman right now and to hell with *habeas corpus* until the danger is over."[269]

At least the media blitz suggested an awareness that there were constitutional obstacles to internment, although it also correctly identified a possible circumvention of that problem in the assertion of military necessity. Of course, the obvious diminution of individual liberties resulting from the state's untethered assertion of a compelling security interest should have triggered a massive response from the civil liberties community. However, the National Lawyers Guild maintained complete support for the government's wartime actions, including the internment.[270] The response of the American Civil Liberties Union (ACLU) was ambivalent. On the one hand, ACLU founder and director Roger Baldwin raised funds for the Supreme Court appeal of *Korematsu*.[271] On the other hand, the ACLU Board of Directors were loath to support the cases of Minoru Yasui[272] and Ernest and Toki Wakayama.[273] Yasui's case was distasteful to the Board because Yasui had worked for the Japanese consulate in Chicago prior to the Pearl Harbor attack and prior to being arrested for violation of DeWitt's curfew order.[274] The Wakayamas' case became disfavored because Ernest Wakayama had been arrested in the Santa Anita assembly center for organizing a protest of the camp's conditions.[275] Irons notes that

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[268] IRONS, JUSTICE AT WAR, *supra* note 138, at 60.

[269] PERSONAL JUSTICE DENIED, *supra* note 212, at 80 (quoting Westbrook Pegler, "Fifth Column Problem on Pacific Coast Very Serious—Japs Should be under Guard," Feb. 16, 1942, DOJ 146-13-7-2-0 (CWRIC 13333)).

[270] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 180–81.

[271] *See id.* at 170.

[272] *See* Yasui v. United States, 320 U.S. 115 (1943). Yasui was arrested for violating DeWitt's curfew order. *See id.*

[273] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 114–15. The Wakayamas reported to an assembly center and filed a habeas corpus petition. After being interned, however, and after the ACLU began doubting the idealness of the Wakayamas as a test case, Ernest Wakayama applied for repatriation and the habeas petition was eventually dropped.

[274] *See id.* at 114.

[275] *See id.* at 115. Although the local ACLU attorney, Al Wirin, continued to represent the Wakayamas on their habeas petitions, "[Ernest] Wakayama's arrest . . . unsettled the ACLU national office." *Id.*

"[i]n the end, the ACLU wound up with no case of its own that tested internment . . . ."[276]

Moreover, the ACLU Board voted by a margin of two-to-one to support the Government's right during wartime "to establish military zones and to remove persons, either citizens or aliens, from such zones when their presence may endanger national security, even in the absence of a declaration of martial law."[277] The only limitations on this right were that it be exercised "only if directly necessary to the prosecution of the war or the defense of the national security" and "based upon a classification having a reasonable relationship to the danger intended to be met."[278] In essence, it was assured that the ACLU would not support direct constitutional challenges to the President's power to authorize the internment. It should be noted, however, that the local ACLU lawyers in San Francisco and Seattle rejected the national office's directives to drop constitutional challenges to Executive Order 9066.[279] Later, the ACLU recanted its wartime position on the internment.[280]

The history of the government's legal campaign to defend the internment is intricate, but crucial to understanding how policy was effected inside the state. In the end, the fight within the government between two camps came down to the wording of a footnote in the government's Supreme Court brief in the *Korematsu* case.[281] Lawyers from the Justice Department, Edward Ennis and John Burling, wanted to signal the Court that DeWitt's *Final Report* did not contain credible evidence upon which a legal determination could be based.[282] Various other Justice Department and War Department lawyers, some of whom

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[276] *Id.* at 116.

[277] *Id.* at 129.

[278] IRONS, JUSTICE AT WAR, *supra* note 138, at 129 (quoting Memo, "To the Active Members of the Corporation," May 22, 1942, Vol. 2444, ACLU, PUL).

[279] *See id.* at 130–32. In particular, Mary Farquharson, Ernest Besig, and Wayne Collins continued their plans for constitutional challenges to the Executive Order at issue in the *Hirabayashi* and *Korematsu* cases.

[280] *See id.* at 349. Edward Ennis, who had been a Justice Department lawyer on the internment cases, later presented to CWRIC the ACLU's view "that the mass evacuation and subsequent detention of the entire Japanese American population from the West Coast in 1942 was the greatest deprivation of civil liberties by government in this country since slavery." *Id.* Ernst Besig later alleged that the ACLU's official involvement with the *Korematsu* Supreme Court appeal actually undermined the strength of Korematsu's defense. *See id.* at 361. Nevertheless, former ACLU head Roger Baldwin's introduction to Captain Allan Bosworth's 1967 exposé on the internment portrays the ACLU record in an uncritical light. *See* Roger Baldwin, *Introduction* to ALLAN R. BOSWORTH, AMERICA'S CONCENTRATION CAMPS 6–8 (1967).

[281] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 287–92.

[282] *See id.* at 288.

had surreptitiously forwarded material from the *Final Report* to the Court through the Western States' amicus brief in the *Hirabayashi* case, fought Ennis and Burling.[283] Ultimately, Assistant Attorney General Herbert Wechsler drafted a "compromise" footnote that used such ambiguous language that the Court could not possibly have been made to understand the extent of misinformation that was at the heart of the government's case.[284]

In preparing the government's Supreme Court brief for the *Korematsu* case, Ennis and Burling obtained a copy of DeWitt's *Final Report*.[285] This was a doctored version of an original report that War Department lawyers McCloy and Bendetson had expunged from the records because it contained material that contradicted aspects of the government's rationalization of the internment.[286] For example, the government had asserted that it would have been temporally impossible to conduct individual loyalty hearings for the Japanese Americans.[287] The first draft of DeWitt's report plainly stated that time was not an issue.[288] In addition, DeWitt's main justification boiled down to a racist assumption that there was no way to separate the "sheep from the goats" because the Japanese were such a "tightly-knit racial group."[289] McCloy called for a redrafting of the report to expunge DeWitt's admission on the question of time and his overt racism.[290]

Nevertheless, the version of the *Final Report* that Ennis and Burling saw still gave the Justice Department lawyers pause. Ennis, while working on the *Hirabayashi* brief, had already been alerted to the existence of intelligence reports directly refuting governmental claims of widespread espionage among Japanese Americans.[291] Upon receipt of the *Final Report*, Ennis asked Attorney General Biddle to initiate an independent check of DeWitt's claims concerning acts of espionage by Japanese Americans around the time of Pearl Harbor.[292] The investigations of both the FBI and Federal Communications Commission revealed not only that DeWitt's allegations were erroneous, but also that they were the result of gross incompetence on the part of army intelligence operatives.[293]

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[283] *See id.* at 287–92.
[284] *See id.* at 289–92.
[285] *See id.* at 278.
[286] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 207–12.
[287] *See id.* at 208.
[288] *See id.*
[289] *See id.*
[290] *See id.* at 210.
[291] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 202–05.
[292] *See id.* at 280.
[293] *See id.* at 280–84.

Despite the efforts of Ennis and Burling, the government brief in *Korematsu* never distanced itself sufficiently from the badly flawed *Final Report.*[294] McCloy, on behalf of the War Department, insisted that Solicitor General Charles Fahy overrule Ennis and Burling's attempt to signal the Court about the inaccuracies of the *Final Report.*[295] Fahy left Herbert Wechsler to resolve the dispute between the two camps.[296] Wechsler accommodated the War Department,[297] not heeding the prescient warning of Ennis and Burling: "If we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose [sic] to state it."[298] Fahy later deliberately misled the Supreme Court in oral argument, insisting on the veracity of the *Final Report* and thus cementing the military monopoly over the historical record that Ennis and Burling had predicted.[299] Only the intervention, against odds, of later historians and lawyers brought to the surface the concealed history of governmental abuse.

In addition to the fraudulent actions of the government that were eventually decisive in later efforts to exonerate Mr. Korematsu,[300] the Supreme Court's deliberations, as shaped by the government's legal strategies, constituted a distinct level of inside-the-state foreign affairs process. Members of the Court voted unanimously in the *Hirabayashi* and *Yasui* cases to uphold the lower courts' convictions for violations of DeWitt's curfew orders, and they voted six-to-three in favor of the

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[294] *See id.* at 280, 284–92.

[295] *See id.* at 287–88.

[296] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 288–89.

[297] The "compromise footnote" authored by Wechsler appeared in the Government's brief. It read: "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts." Brief for the United States at 11 n.2, *Korematsu.* Burling's proposed footnote was direct and unequivocal:

> The Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry, *in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.*

IRONS, JUSTICE AT WAR, *supra* note 138, at 286 (emphasis added) (quoting Burling to Wechsler, September 11, 1944, File 146–42–7, DOJ).

[298] IRONS, JUSTICE AT WAR, *supra* note 138, at 288 (quoting Ennis to Wechsler, September 30, 1944, Box 27, Folder 31, Fahy Papers, FDRL).

[299] *See* Peter Irons, *Fancy Dancing in the Marble Palace,* 3 CONST. COMM. 143, 147–53 (1986) (discussing the transcript of Fahy's oral argument in *Korematsu* and the "flat out lie" and misrepresentations it contains).

[300] *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting *coram nobis* petition and vacating Korematsu's 40 year-old conviction).

exclusion orders at issue in *Korematsu.* The assembling of voting blocs in these cases involved substantial maneuvering[301] that saw the Justices conflating facile patriotic and racist impulses with jurisprudential concerns in their consideration of the internment. The Court's analysis of the government's authority to intern civilians without individual determinations of guilt came down to the question of whether there had been a reasonable basis, in the face of a "national security threat," for doing so.[302] The case for reasonableness rested on the government's so-called racial characteristics argument, which portrayed Japanese Americans, as a group, as inscrutable and disloyal.[303]

Chief Justice Stone's opinion for the Court in *Hirabayashi* clearly drew upon the racial characteristics argument in finding DeWitt's curfew order reasonable. As noted above, the "data" behind the racial characteristics argument came to the Supreme Court in *Hirabayashi* from obscure sources by way of the racist Dies Committee propaganda campaign, Earl Warren's testimony before the Tolan Committee, DeWitt's *Final Report,* and the unethically authored Western States' amicus brief.[304] Stone included in his opinion the more innocuous strands of the racially contingent case made by these sources against the Japanese Americans, including a possible allusion to Warren's highly attentuated geographic proof of conspiracy,[305] and a reference to the fact that Japan's *jus sanguinis* nationality law may have created dual citizenship for Japanese Americans.[306]

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[301] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 250. Irons points out that at the outset of the *Hirabayashi* and *Yasui* deliberations, a possible majority of five Justices "voiced serious doubts about the legality of DeWitt's orders and their constitutional basis. Compromise, cajolery, and their own concerns that the Court should maintain unity in wartime finally persuaded this potential majority for reversal to make [Chief Justice] Stone's opinion unanimous." *Id.*

[302] *See* Hirabayashi v. United States, 320 U.S. 81, 101 (1943) ("Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.").

[303] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 137–39. The government's strategy had been to get the courts to take judicial notice of the racial characteristics argument so that the "evidence" would not face attack or rebuttal at trial. *See infra* text accompanying notes 317–25.

[304] *See supra* text accompanying notes 251–59.

[305] *See* BOSWORTH, *supra* note 280, at 73–75. Before the Tolan Committee, Warren had presented maps and census data in order to prove the existence of a conspiracy among Japanese Americans to commit sabotage. *See id.* Warren's conspiracy theory was based on the fact that Japanese Americans owned or leased property near railroads, airports, roads, power lines, and canals. *See id.* To the extent Warren's representations were accurate, there were better explanations for them than sabotage. For example, "Issei immigrants had laid a great deal of the railroad tracks, and . . . many of them were paid in land grants along the right of way. This was land nobody else wanted. It was cheap, and loud with the noise of passing freight trains. The Japanese made it fruitful." *Id.* at 76; *see* Cho, *supra* note 250.

[306] *See Hirabayashi,* 320 U.S. at 96–98.

Perhaps the most outrageous moment in the opinion is Stone's recitation of the history of official and private discrimination against Japanese Americans as evidence that it was reasonable to doubt their loyalty to the United States: "There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population."[307] Stone then cites to federal and state anti-Asian and anti-Japanese laws on naturalization, immigration, land ownership, racial intermarriage, and employment.[308] The Chief Justice concludes:

> As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.[309]

The racial characteristics argument, based on a factual record that was never subjected to the adversarial process, thus became integral even to the Court's published holding. The law of foreign affairs, effected through the internment jurisprudence, is inextricably bound up with the racial contingency at the heart of the government's case.[310]

Interestingly, Justice Douglas was joined by Justices Murphy and Rutledge in rejecting the racial characteristics argument implicitly endorsed by Stone.[311] Douglas wrote a draft concurrence for the *Hirabayashi* case protesting the government's racially contingent rationale, but nevertheless adopting language that, in Irons' words, "matched the jingoism of the Hearst press": "We are engaged in a war for survival against enemies who have placed a premium on barbarity and ruth-

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[307] *Id.* at 96. Irons notes that the original draft of the government's brief contained a much more balanced, less racist, rendering of the social conditions argument. The Justice Department rejected this version however. *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 196–98.

[308] *See Hirabayashi*, 320 U.S. at 96 n.4.

[309] *Id.* at 98.

[310] See *infra* discussion accompanying notes 408–22, regarding Justice Rehnquist's defense of the internment.

[311] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 105–14.

lessness. Self-preservation comes first. The United States wages war to win. And the war power in its command over the people and resources of the nation is ample for that purpose."[312] Douglas goes on to assert that the Court cannot judge such result-oriented military decisions, a position which was retained in the published opinion.[313]

There is a telling tension evident in Douglas' draft opinion between his patriotically hyped assertion of the government's nonjudicially reviewable war power and his rejection of the "factual basis" in the case before him that comprised both a general wartime context and presumed racial characteristics of the targeted Japanese American community. Indeed, this tension existed by design as the government's lawyers had intentionally manufactured a strategic conflation of law and "facts" from the earliest stages of the litigation in order to overcome several formidable legal obstacles. First, they had to contend with Supreme Court precedent regarding constitutional limitations on the government's war powers, especially as represented by the case of *Ex parte Milligan*.[314] Second, although the Fourteenth Amendment's equal protection mandate had not yet been applied to the Federal Government, it was unlikely that the New Deal Court would give blanket approval to plainly discriminatory treatment of a "discrete and insular minority"[315] without further rationalization.

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[312] *Id.* at 238 (quoting Douglas, draft of concurring opinion in *Hirabayashi*, June 7, 1943, pp.1–2, Box 79, *Hirabayashi* and *Yasui* cases folder, Douglas Papers, LC). Douglas' published concurrence in *Hirabayashi* did not include the macho jingoism of the draft.

[313] *See Hirabayashi*, 320 U.S. at 106 (Douglas, J., concurring) (asserting that the Court can not "sit in judgment on the military requirements" behind the internment).

[314] 71 U.S. 2 (1866). In *Milligan*, the Court curtailed the government's emergency powers by declaring the operation of a wartime military commission (tribunal) in Indiana *ultra vires* under the Constitution. The defendant in the case, accused of engaging in traitorous activities as a so-called Copperhead or Confederate sympathizer, was tried and convicted by the military commission acting under authority of presidential order. The *Milligan* Court refused to grant such sweeping powers to the government, even under color of martial law. *See id.* at 127–31. In his opinion for the Court, Justice Davis refused the proposition that:

> in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

Id. at 124. Further, "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 127. "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." *Id.*

[315] The call in footnote four of *Carolene Products*, United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938), for a higher level of scrutiny in cases involving classes of discrete and

The government's lawyers planned to have judicial notice taken of "facts" that were mainly stereotypes, lies, and innuendos.[316] In this manner, they would avoid having to litigate propagandistic representations of Japanese Americans in court. Charles Burdell, a Justice Department lawyer working on the *Yasui* case who adopted the judicial notice stategy, drafted a memorandum for submission to the trial judge that contained a straightforward statement of the argument.[317] Irons relates the contents of the memorandum:

> "Jap citizens are inevitably bound, by intangible ties, to the people of the Empire of Japan," [Burdell] wrote. "They are alike, physically and psychologically." Burdell then elaborated his genetic theory of loyalty. "Even now, though we have been separated from the English people for over 100 years, we still take pride in the exploits of the R.A.F. over Berlin, and the courageous fighting of the Aussies in Northern Africa. Why? Because they are people like us. They are Anglo-Saxons." Burdell's theory equally fit the Japanese Americans. "Who can doubt that these Japs in this country, citizens as well as aliens, feel a sense of pride in the feats of the Jap Army—this feeling of pride is strong in some, weak in others, but the germ of it must be present in the mind of every one of them."[318]

There is no proof that the memorandum was delivered to the judge in the trial of Minoru Yasui, but it shows how the lawyers imagined judicial notice would work in the test cases. Indeed, at trial, Judge James Fee interrogated Yasui from the bench regarding the Shinto religion even as Yasui testified that he had been raised Methodist by Methodist parents.[319] Fee seemed convinced that all Japanese

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insular minorities was nominally heeded in *Korematsu*. *See Korematsu*, 323 U.S. at 216 ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

[316] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 138–39. War Relocation Authority lawyers who came up with the judicial notice strategy listed a number of "propositions" of which the courts may take judicial notice. These included: difficulties posed by "Caucasian experiences with Oriental psychology"; loyalty to Japan because of education or membership in the Shinto religion and a resulting racial affinity; and the threat to themselves posed by Japanese Americans who remained at large. *See id.* Of course, evidence of which judicial notice may be taken should involve only "undisputed" factual matters. *See id.* at 137–38.

[317] *See id.* at 139–40.

[318] *Id.* (quoting Charles Burdell to Tom Clark, Apr. 27, 1942 (with attached brief), File 146–13–7–2–0, DOJ).

[319] *See id.* at 141.

Americans were adherents of the Shinto religion and thus obliged to remain loyal to the Emperor of Japan.[320]

The government's lawyers sought to assert a new conception of war powers,[321] shot through with authority to instantiate the white nationalism that had created the momentum toward internment in the first place.[322] Philip Glick, the War Relocation Authority's (WRA) solicitor, saw a way around *Milligan* and equal protection arguments by reading into the war powers a transcendent constitutional governmental power to act with impunity toward a racial minority.[323] Glick recognized that the government's racially discriminatory action would have to relate to a "genuine war need," and that a determination would be made by the courts as to reasonableness.[324] Yet, the balance to be struck between the war powers and equal protection or due process could be settled well in advance of any real assessment if the courts were made to understand the racial content that lay behind the reworked war powers construct.

Such was the substance embedded in the government's procedural strategy of judicial notice. The courts' determination of reasonableness was not to, and did not, occur outside the underlying conception of white nationhood that reanimated the concept of war powers. The blending of "facts" and doctrine created a normative and epistemological fabric in which were interwoven the strands of racially contingent patriotism-*cum*-foreign affairs jurisprudence. Indeed, the lines along which doctrinal divisions congealed among the Justices show the imbrication of racial and foreign affairs ontologies.

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[320] *See id.*

[321] In addition to *Milligan*, other precedent had laid out the contours of the war powers and suggested that constitutional limits and robust judicial review were the norm. *See* Ex parte Quirin, 317 U.S. 1, 25 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution."); Mitchell v. Harmony, 13 How. 115, 134–35 (1851) ("Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it."); Sterling v. Constantin, 287 U.S. 378 (1932) (holding that a state governor's declaration of martial law was subject to judicial scrutiny and rejection). *But cf.* Martin v. Mott, 12 Wheat. 19 (1827); The Prize Cases, 2 Black 635 (1862); Moyer v. Peabody, 212 U.S. 78 (1909). *See generally* Rostow, *supra* note 146, at 530 (1945) ("What lies behind *Ex parte Milligan, Mitchell v. Harmony*, and *Sterling v. Constantin* is the principle of responsibility. The war power is the power to wage war successfully, as Chief Justice Hughes once remarked. But it is the power to wage war, not a license to do unnecessary and dictatorial things in the name of the war power.").

[322] *See supra* text accompanying notes 236–59.

[323] *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 125–28.

[324] *See id.* at 126.

For example, Justice Murphy, who most clearly saw the racially contingent nature of the internment,[325] also was most insistent on the justiciability of issues arising under the exercise of the war power: "While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace . . . ."[326] To the contrary, Justices Stone, Black, and Frankfurter, who each refused to see as germane the racially discriminatory basis at the heart of the internment,[327] signed their names to judicial opinions[328] suggesting nonreviewability of the war

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[325] In *Hirabayshi*, Justice Murphy drafted a dissent which was never filed. *See* IRONS, JUSTICE AT WAR, *supra* note 138, at 244–46. In it he wrote: "Instead of [a serious attempt to identify disloyal individuals], by a gigantic round-up no less than 70,000 [sic] American citizens are placed under a special ban and deprived of their liberty because of a particular racial inheritance. . . . This is so utterly inconsistent with our ideals and traditions, and in my judgement so contrary to constitutional sanctions, that I cannot lend my assent." *Id.* at 244 (quoting Murphy, draft of dissenting opinion in *Hirabayashi*, pp. 4–5, Box 132, Murphy Papers, UML). In the end, Murphy succumbed to pressure and dropped his dissent. *See id.* at 246. However, Murphy filed a dissent in *Korematsu* that spoke of the internment in direct terms: "Such exclusion [under DeWitt's order] goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

[326] Hirabayashi v. United States, 320 U.S. 81, 113 (1943) (Murphy, J., concurring).

[327] See Stone's opinion for the Court in *Hirabayashi*, 320 U.S. at 101. Stone stated:

> [t]he adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others [sic], is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.

Id.; see also Black's opinion for the Court in *Korematsu*, 323 U.S. at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented [sic], merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race."). In Frankfurter's concurrence in *Korematsu*, he stated:

> If a military order such as that under review [DeWitt's exclusion order] does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts.

Korematsu, 323 U.S. at 225 (Frankfurter, J., concurring).

[328] *See* Douglas' concurrence in *Hirabayashi*, 320 U.S. at 106 (Douglas, J., concurring); *see also* Black's opinion for the majority in *Korematsu*, 323 U.S. at 225 ("To find the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."). In Jackson's dissent in *Korematsu*, he stated:

> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not

power.[329] Justice Stone's opinion for the Court in *Hirabayashi*, which was echoed in the opinions of his like-minded colleagues, drew such a firm line between the war-making powers of the government, exclusively exercised by Congress and the executive rather than the judiciary, that in retrospect it is easy to infer the Court's unstated bias.[330] Such absolute nonreviewability of the war power had never been held by a majority of the Court.[331] Frankfurter went so far as to groundlessly hypothesize a kind of fourth branch of Government—the war-making branch—operating in a separate constitutional sphere.[332]

The due process analysis, undertaken by the Court only indirectly,[333] further instantiates the racially contingent foreign affairs ju-

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> be proved. . . . My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task.

Korematsu, 323 U.S. at 245, 248 (Jackson, J., dissenting).

[329] To an extent, the commitment to nonreviewability was more rhetorical than actual as the Justices' opinions were a study in performative contradiction. While suggesting that the government's actions were nonreviewable, the opinions contained legal and factual analysis that strongly resembled standard judicial review. Tracing the particular nonreviewability tradition begun by the internment cases, Professor Yamamoto discusses cases from the 1980s in which the Burger Court adopted a similar discretionary "judicial value judgment that the government's self-protective concerns, whether latent or explicit, specific or general, justify essentially unreviewable government restrictions of civil liberties." Yamamoto, *supra* note 141, at 33.

[330] Justice Stone wrote:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by [Congress and the President], it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Hirabayashi, 320 U.S. at 93 (citations omitted).

[331] *See* HENKIN, *supra* note 14, at 141–48.

[332] *See Korematsu*, 323 U.S. at 224–25 (Frankfurter, J., concurring). Frankfurter wrote in his *Korematsu* concurrence:

> the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs.

Id.

[333] *See* Yamamoto, *supra* note 141, at 23.

risprudence. In *Hirabayashi*, Justice Stone weighs the reasonableness of the curfew order against a hypertrophied war power.[334] Stone's discussion correctly considers a less racially discriminatory alternative to the existing curfew orders that targeted only Japanese Americans. Might not DeWitt have ordered a blanket curfew in the designated sensitive areas, affecting all racial groups equally, and still effectively achieved the desired end? The Court, however, flatly rejects such a policy as it "balances" the interests involved. "In a case of threatened danger requiring prompt action, [the alternative would require] a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat."[335]

The liberty interests of non-Japanese Americans in the zone are weighed favorably vis-à-vis the presumed military necessity of guarding against domestically based sabotage and espionage.[336] These non-Japanese American interests are found to warrant protection in the all-or-nothing logic of the Court ("needless hardship on the many" versus "sitting passive and unresisting"), whereas the trampled liberty interests of Gordon Hirabayashi and fellow Japanese Americans are relegable to secondary status as an incidental burden to be borne during "wartime." The Court does not explain why the "doctrine of equality," which would have been maintained by such a universal curfew order, is less significant than safeguarding the interests of the non-Japanese Americans in the military zone. Indeed, by the Court's own assessment, "every military control of the population of a dangerous zone in war time . . . necessarily involves some infringement of individual liberty . . . ."[337] In light of the Court's analysis and holding in *Hirabayashi*, however, the concepts of necessity and national sacrifice themselves must be understood as racially contingent, as must the resulting due process calculus.

A final aspect of the internment that warrants attention here is the resistance movement by Japanese Americans inside the camps. The "no-no" movement, so named because its members refused to give affirmative answers to two questions put to internees on a loyalty questionnaire, met with government repression in the form of a segregation program that placed "disloyal" Japanese Americans in the

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[334] *See* 320 U.S. at 95.

[335] *Id.*

[336] Indeed, it has been pointed out that Americans arrested as Japanese spies after the initial round-up of known Japanese agents immediately following Pearl Harbor were all whites. *See* Rostow, *supra* note 146, at 523.

[337] *Hirabayashi*, 320 U.S. at 99.

camp at Tule Lake.[338] Questions 27 and 28 on the WRA's "Application for Leave Clearance" asked, respectively, whether the internee would be willing to serve in the U.S. armed forces and swear unqualified allegiance to the United States.[339] Approximately 9000 Japanese American internees refused to give an unqualified affirmative answer to question 28 and thus were categorized as disloyal by the WRA.[340] In addition, some internees attempted, with the "help" of Congress,[341] to renounce their U.S. citizenship.[342]

The motivations of those answering "no-no" and renouncing U.S. citizenship, however, had little to do with either their loyalty to the state (whatever that meant) or, other things being equal, their willingness to serve in the armed forces.[343] Rather, these resisters objected to their maltreatment at the hands of the government.[344] Their branding and handling as "disloyal" in a sense completes the absurd picture painted by the application of a simplistic understanding of the state and its "unitary" identity.

As Chris Iijima shows in his article on the redress and reparations movement,[345] the concept of patriotism—the imaginary proper relationship between citizens and the state—that was enforced by Congress in creating the Civil Liberties Act itself acts to suppress the expression of legitimate dissent within the state. That Japanese American resisters inside the camps were labeled as "disloyal" reveals again the internal contradiction of the unitary state construct that animates foreign affairs law. Even as the government acted to exclude Japanese Americans from its definition of the state's imagined unity, it categorized and further penalized those among the excluded who dared to protest the injustice. Such an absurd outcome is the result of a faulty grasp of the relationship between states and groups of actors whose political identities do not correspond with the unitary state construct.

In summary, the internment history discussed in this Part reveals a number of aspects of foreign affairs processes inside the state that

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[338] *See* DANIELS, *supra* note 215, at 112–14.

[339] *See id.* at 113.

[340] *See id.* at 114.

[341] Congress passed the Denationalization Act in 1944 in order to make it easier for Japanese Americans to renounce their U.S. citizenship. *See id.* at 116.

[342] *See id.*

[343] *See* DANIELS, *supra* note 215, at 114, 116–17. Several hundred Japanese American males refused induction into the armed services and 263 were convicted of draft evasion. Their resistance was expressly an act of resistance to the internment. *See* PERSONAL JUSTICE DENIED, *supra* note 212, at 246–47.

[344] *See id.*

[345] *See* Iijima, *supra* note 5.

throw into question the basic tenets of the IR realist framework of foreign affairs law. The actions of individuals, both outright racists and aspiring bureaucrats, were central to intra-governmental pressure to intern. Similarly, racist and opportunistic politicians and "special interest" organizations from civil society played a significant role in applying pressure from outside the government. The media's role, in particular the actions of a few influential publicists and editors, contributed greatly to the pro-internment atmosphere. Intra-governmental agency competition also fueled the dynamics behind internment.

The legal history, regarding both the Court and government and civil libertarian attorneys, reveals another set of factors that had little connection with national security concerns and certainly prevented a fair consideration of the internment's legality. Furthermore, the resistance that arose among Japanese Americans led to additional manipulations of statist logic (loyalty/patriotism) as the interning authorities disposed of such challenges. The case made here by looking inside the state is that there is very little "state" to observe in the processes that led to the internment. Rather, a sordid array of individual actors and ignoble motivations congeal to produce this legally sanctioned pursuit of "national interest." In the remainder of this article, I will suggest that the internment is a critical precedential instance of IR realist-driven foreign affairs law, precisely because it reveals how conceptual blindspots flowing from the underlying ontological framework insure the likelihood of particularistic outcomes passed off as universalist realizations of the national interest.

III. Of New Precedents

This section will outline the conceptual framework for a different approach to foreign affairs based on the perspectives of IR critical theory. The IR critical theory breakthrough of the 1980s and 1990s has challenged fundamental IR realist conceptual frameworks by questioning the ontological given-ness of the state, internal/external spatiality, and national security.[346] These critiques of IR realism open the way to a different understanding of the internment as part of the genealogy of foreign affairs law. Cultural and social determinants, such as the racism behind internment,[347] condition international relations and

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[346] *See infra* discussion accompanying notes 353–89.

[347] For a scathing critique registered at the time of the internment, see Justice Murphy's dissenting opinion in *Korematsu*, 323 U.S. at 233, 234, where the Justice referred to the exclusion program as falling "over 'the very brink of constitutional power'" and "into the ugly abyss of racism." *See* Personal Justice Denied, *supra* note 212, at 18 ("The broad historical causes which

foreign affairs law at a fundamental level. In this light, the internment cases are not anomalous in U.S. jurisprudence, but rather should be understood critically as "leading cases" in the trajectory of foreign affairs law. From this perspective, the internment suggests a close connection between identity-contingent formations, racism and xenophobia, and legal structuring of the field.

A. *IR Critical Theory*[348]

IR critical theory arose in the 1980s as part of a wider movement across many disciplines that, put simply, viewed established intellectual paradigms as historically contingent effects of modernity. Modernity here is understood as the western civilizational project whereby particular, but not inevitable, forms of knowledge, and social and political ordering become ascendant, enabling a narrowly defined vision of progress and emancipation.[349] IR critical theory includes various divergent approaches that derive from poststructuralism, deconstruction, and Habermasian and Gramscian critical theory.[350] What these approaches share in common is a rejection of the epistemological and ontological predilections of IR realism.[351]

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shaped these decisions [to exclude and intern Japanese descended citizens and residents] were race prejudice, war hysteria and a failure of political leadership.").

[348] IR critical theory, like IR realism, is imperfect shorthand for a varied body of scholarship including so-called constructivist, post-structural and, generally, postmodern approaches. *See* Robert W. Cox, *Social Forces, States, and World Orders: Beyond International Relations Theory*, 10 MILLENNIUM 126, 128–30 (1981) (distinguishing problem-solving theory that accepts existing conditions from critical theory which seeks to transform those conditions). The commonality linking these approaches is their rejection of IR realism's basic tenets. IR critical approaches, for example, critically problematize states, sovereignty, security, threat, etc. as effects, rather than privileging them as *a priori* categories of analysis. Depending on the particular type of IR critical theory adopted, emphasis may be placed on discursive, institutional, political-economic and gender relations as constituting the given construction. *See* Jepperson, *supra* note 51, at 45–47 (citing and describing what he terms "constructivist" and "radical constructivist" approaches). IR critical approaches might also be grouped together under the general rubric of "post-positivist." *See* BROWN, *supra* note 20, at 55 ("[t]he new discourses are, above all else, anti-positivist . . . .").

[349] *See generally* KEYMAN, *supra* note 49, at 91–95. The Frankfurt School of social theory is often credited with initiating the systematic critique of modernity. *See, e.g.*, THEODOR ADORNO & MAX HORKHEIMER, DIALECTIC OF ENLIGHTENMENT (1979); JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES (1987).

[350] I focus here on those elements of IR critical theory most useful for the present project of understanding how racial formation relates to foreign affairs law. Largely omitted from the discussion are so-called structural (historical materialist) approaches, which are nevertheless important components of the critical literature in the field. *See, e.g.*, ROBERT W. COX, PRODUCTION, POWER AND WORLD ORDER: SOCIAL FORCES IN THE MAKING OF HISTORY (1987); GRAMSCI, HISTORICAL MATERIALISM AND INTERNATIONAL RELATIONS (Stephen Gill ed., 1993); ANDREW LINKLATER, BEYOND REALISM AND MARXISM: CRITICAL THEORY AND INTERNATIONAL RELATIONS (1990).

[351] So, for example, whereas IR realism is unabashedly positivist with its faith in the objectivity

Three insights from the growing body of IR critical theory are especially pertinent to the argument forwarded here. These involve critiques of the state, the inside/outside dichotomy, and the security construct. First, critical theorists have problematized IR realist reliance on the state as the foundational element from which all descriptive and normative consequences flow. Richard Ashley, for example, rejects the image of the state as "an unproblematic unity, an entity whose existence, boundaries, identifying structures, constituencies, legitimations, interests and capacities to make self-regarding decisions can be treated as given."[352] Similarly, Jens Bartelson critiques the concept of state sovereignty, asserting that "sovereignty and knowledge implicate each other logically and produce each other historically."[353] Knowledge in turn is political, resulting from a series of contingent ontological choices.[354] Drawing more directly on French deconstruction, Cynthia Weber asserts that "[t]he state is a sign without a referent,"[355] and that states exist only through the process by which they are "written" by political actors and political scientists.[356] David Campbell's study of United States foreign policy concludes that foreign policy discourse is integral to the construction of the state's identity. Campbell questions the state's ontological status by revealing the centrality of particular discursive practices that constitute it.[357]

In addition to this political theory, a useful body of social theory, associated with Theda Skocpol and others, has been developed in response to instrumentalist and structuralist approaches that understood the state mainly from the perspective of its role in enabling the

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of the scientific method, and adherence to the bottom-line ontological distinction between the observing subject and the observed object, IR critical theory is post-positivist and reflexive, placing science in a social and cultural context, and conceiving of subjects and objects as part of a mutually constituting process. Knowledge and power are thus linked, and epistemology and ontology are open invitations to critical inquiry, not *a priori* categories upon which to erect "disinterested" disciplines. For an introduction to the cultural turn in international studies that most clearly breaks with the IR realist tradition, see generally essays collected in THE RETURN OF CULTURE AND IDENTITY IN IR THEORY (Yosef Lapid & Friedrich V. Kratochwil eds., 1996).

[352] Richard K. Ashley, *The Poverty of Neo-Realism*, 38 INT'L ORG. 238 (1984). *See generally* WILLIAM C. OLSON & A.J.R. GROOM, INTERNATIONAL RELATIONS THEN & NOW (1991) (describing the evolution of the state as subject in international relations).

[353] JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY 5 (1995).

[354] *See id.* at 6–7.

[355] CYNTHIA WEBER, SIMULATING SOVEREIGNTY: INTERVENTION, THE STATE AND SYMBOLIC EXCHANGE 123 (1995).

[356] *See id.* at 1–10. Weber's notion of "writing the state" refers to the process by which states and their "referent," sovereignty, are called into being by the actions of statespersons, particularly through the transgression of sovereignty in the form of interventions. Weber examines a number of historical interventions including the recent United States invasions of Panama and Grenada.

[357] *See* CAMPBELL, *supra* note 73, at 9, 68–70 ("Foreign policy was not something subsequent to the state or the interstate system, but integral to their constitution.").

maintenance of particular relations of production under capitalism.[358] This theory asserts that the state's relative autonomy resulted from the "transnational structure of military competition" that was "not originally created by capitalism" but was a product of the territorialized international system.[359] The state is "brought back in" to social history as a "dual anchor" between internal socioeconomic conditions and external international relations.[360] Such a dual understanding of the state rejects the functionalism that viewed the state as determined either wholly by capitalist actors or by the structure of internal social conflict and cooperation. Skocpol's project was designed to return the state to its particular historicity and understand its development as an organizational form apart from the development of global capitalism.[361]

From the perspective of IR critical theory, there are both strengths and weaknesses of the social theoretical project to rethink the state. The primary strength is that the state is expressly viewed as a social agent and thus potentially subject to scrutiny as a product of social and cultural processes. Such scrutiny suggests alternative perspectives on foreign affairs law precluded by the IR realist reification of the state. A weakness, however, is that such social theories of the state have themselves led to the "assumption that the agency [i.e., the state] possesses a coherent self,"[362] perhaps unwittingly buttressing status quo ontologies. Such social theoretical approaches may thus fail to recognize the "historical and discursive construction of [state] identity."[363]

The social theoretical approach places the state at the nodal point between internal social and cultural conditions and the external realm whose conditions derive primarily from the defining features of militarism and territoriality.[364] Thus, the basic IR realist binarism of a

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[358] *See* THEDA SKOCPOL, STATES AND SOCIAL REVOLUTIONS (1979) [hereinafter SKOCPOL, STATES]; Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research, in* BRINGING THE STATE BACK IN 3 (Peter Evans et al. eds., 1985) [hereinafter Skocpol, *Bringing the State Back In*]. Skocpol's intervention was in part a response to the heavily structural critiques of global political economy such as that of world systems theory. *See, e.g.*, ANTHONY GIDDENS, THE NATION-STATE AND VIOLENCE (1985); MICHAEL MANN, THE SOURCES OF SOCIAL POWER (1986); IMMANUEL WALLERSTEIN, THE POLITICS OF WORLD ECONOMY (1984).

[359] SKOCPOL, STATES, *supra* note 358, at 110; *see also* Skocpol, *Bringing the State Back In*, *supra* note 358.

[360] *See* SKOCPOL, STATE, *supra* note 358, at 32.

[361] *See* KEYMAN, *supra* note 49, at 54–86 (discussing how the social theory of the state could contribute positively to a post-realist theory of the state in international relations).

[362] *Id.* at 84.

[363] *See id.* at 86.

[364] The duality of states as the nodal point between the internal, socioeconomically-determined order and the external, territorially and militarily-contested order offers a more nuanced

domestic inside and an international outside[365] is complicated by the presence of the more or less autonomous third element of the state. The state becomes analytically distinct from either the internal realm of the social and cultural or the external territorialized realm of militaristic "relations." However, the state is conceived as an important *institutional* factor that may create effects and respond to conditions in both realms, and which is no longer the mysterious "black box" of IR realism.

Decoupling the state from such imaginary entities[366] as the "nation," the "republic," or "we the people," may be an important step in reconstructing foreign affairs law. The normative primacy given to governmental exercises of power—the equating of military or economic capability to act with proper "national interest" in such action—in foreign affairs legal discourse is undermined when the particularistic institutional dynamics behind, and resistances to, policy formation are foregrounded. Moreover, the nature of the state can be seen to derive from a differently conceived relationship to the international realm than is implied by the anarchy problematique. Instead of the state protecting the internal order from the chaotic external, the state asserts license on its *own behalf* to cope with territorialized imperatives of the militaristic external realm. The state-as-institution may thus respond to external stimuli in a manner that resembles other institutions law typically regulates—corporations, churches, and other agencies of civil society and local government. The result, then, of applying poststructural critical theory and social theoretical approaches to the state in foreign affairs law could be an understanding of the state as

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understanding of state behavior by adding back an element of social agency that opposes the functionalism of classical structuralist accounts of the state. *See* Fred Halliday, *States and Society in International Relations*, 16 MILLENNIUM 215, 217 (1987). However, I would defend a modified structuralism that sees states (and, for example, foreign affairs) as embedded in internal and external socio-cultural and economic imperatives based on difference, which are "structured into" state action. Social historians argue that the state system developed under the historical imperatives of territoriality and, therefore, that states were not products of the expansion of global capitalism. It is also true, however, that the territorial principle at the heart of the state system's historical and conceptual foundation developed in concert with a basic logic of difference. This logic tied certain territories and the privileged status of peoples within those territories to a conception of religious identity, gender, nationality, ethnicity or race. For works which have traced the role of these types of identity formations against the rise of the nation-state system, see generally, BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983); PAUL GILROY, THERE AIN'T NO BLACK IN THE UNION JACK (1987); ERIC HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 (1990); WOMAN, NATION, STATE (Nira Yuval-Davis & Floya Anthias eds., 1989).

[365] *See infra* discussion accompanying notes 368–76.

[366] *See* ANDERSON, *supra* note 364.

socially, culturally and discursively constructed; a decoupling of the state from the imaginary unity of the body politic; a jurisprudential deprivileging of foreign affairs and national security "imperatives" and the placing of state action in an institutional context comparable to other forms of bureacratic and institutional action.

Second, IR critical theory has exposed and demystified a number of significant ontological choices implicit in the IR realist paradigm. One among these, the inside/outside dichotomy which grounds the dominant epistemological framework of international relations, builds on the basic understanding of the state as a unified and territorially determined subjectivity. Through the binary logic of difference, the characteristics of the "absent" external realm (unchanging structure, ahistoricity, chaos, lack of community, irrationality) define the "present" internal realm and its characteristics (agency, history, order, community and rationality).[367] Critiquing this binarism, R.B.J. Walker sees "modern theories of international relations as a discourse that systematically reifies an historically specific spatial ontology, a sharp delineation of here and there, a discourse that both expresses and constantly affirms the presence and absence of political life inside and outside the modern state as the only ground on which structural necessities can be understood and new realms of freedom and history can be revealed."[368]

Walker explains sovereignty as a spatialized answer to difficult political theoretical questions that arise over the contradiction between universalist claims of authority and legitimacy and the particularistic nature of interests that come to be served through formalized governance. He writes: "Within states, universalist aspirations to the good, the true and the beautiful may be realizable, but only within the spatially delimited territory."[369] Outside states, only radical contingency is possible.[370] A whole set of binarisms is put in place by this spatial ontology. The inside becomes the realm of ethics, progress, community, self and identity, while the outside is the realm of power politics, structural stalemates, anarchy, and inscrutable difference.[371] This reified spatial

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[367] *See* KEYMAN, *supra* note 49, at 134–35. Keyman summarizes several texts by Ashley in making this point, chiefly Richard K. Ashley, *The Geopolitics of Geographical Space: Towards a Critical Social Theory of International Relations*, 12 ALTERNATIVES 413 (1987). The notion of presences/absences is drawn from deconstruction's critique of logocentrism as the primary logic of western metaphysics. *See generally* JONATHAN CULLER, ON DECONSTRUCTION 92–94 (1982).

[368] *See* WALKER, *supra* note 56, at ix.

[369] *Id.* at 62.

[370] Of course, sovereignty can also bring about the denial of the "true and the beautiful," for example, when governments shield themselves from international scrutiny based on claims of exclusive domestic jurisdiction. *See* Iglesias, *supra* note 26, at 374.

[371] *See* WALKER, *supra* note 56, at 63–64, 67.

order has important consequences. The anarchy of the external realm is rendered impossible to analyze and ahistorical.[372] Further, the duality suggests the necessity of subjecting the inside to the disciplinary regimes of modern societies,[373] making IR realism a legitimating discourse of *internal* subjugation. Indeed, Jim George finds a direct link between the dynamics of the outside and inside realms: "the [external] anarchy problematique acts to empower ruling elites by silencing differences, discontinuities, and conflicts *within* 'domestic' states, and converting them into the anarchical basis of conflict *between* states."[374] E. Fuat Keyman argues that "a successful critique of realism should start with the inside and its problematization."[375]

This spatial ontology results in varying approaches to domestic and foreign affairs theories of law. In short, the spatial political imagination of modernity has limited the operation of "real law" to the internal realm. In the liberal legal story, law acts as a neutralizing force that, in a sense, balances destabilizing vagaries of the *potentially* Hobbesian internal social and cultural order. Relations, the hyperpolitics of the international realm, are "outside law" because they are outside the potentially unruly but ultimately manageable realm of the social and cultural. Thus, the critique of IR realism's inside/outside spatial ontology destabilizes a foreign affairs legal discourse that operates by placing the entire sphere of externally directed action outside "normal" liberal legal frameworks. In the Appendix, Figure (2) graphically depicts this spatial ontology, which IR critical theory rejects. Also located in the Appendix, Figure (3) diagrams a possible "transnational" political and legal model underwritten by IR critical theory's revisioning of the state and inside/outside spatial ontology.

A third relevant focus of IR critical theory has been the discursive construction of national security around which a whole subdiscipline of international relations, known as security studies, has formed. Critical approaches reject the IR realist privileging of security as an *a priori* concept, instead problematizing it as a construct that is operationalized through societal, cultural, and institutional practices and discourse. Various critical methodologies have been used in stripping security of its primacy. Peter Katzenstein has argued that, contrary to mainstream assumptions, national security does not stand in a transparent relationship to a predetermined set of interests rationally formed by a unified

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[372] *See* Richard K. Ashley, *A Double Reading of the Anarchy Problematique*, 17 MILLENNIUM 141 (1988); KEYMAN, *supra* note 49, at 135.

[373] *See* HUNT & WICKHAM, *supra* note 18, at 22–23 (explaining Foucault's concept of disciplinary society in a legal theoretical perspective); KEYMAN, *supra* note 49, at 136.

[374] George, *supra* note 29, at 63.

[375] KEYMAN, *supra* note 49, at 136.

national community.[376] This means national security is a proper object of sociological investigation because "security interests are defined by actors who respond to cultural factors,"[377] including, I would argue, those factors which contribute to raced, classed, sexed, and gendered systems of subordination. In this view, the *meanings* attached by actors to national security, not "real threats out there," are of primary significance. These meanings are important for understanding "the cultural-institutional context of policy on the one hand and the constructed identity of states, governments and other political actors on the other."[378] It is necessary, in the first instance, to "focus on the character of the state's environment and on the contested nature of political identities."[379]

National security is, in this sense, a metaphor that ascribes to "the nation" the ability to perceive safety and well-being in the same way individual subjects presumably do in their "survival struggles." The metaphor collapses the multiplicity of society into a monolithic sameness of nation.[380] The underlying notion of "the national interest"[381] underwrites the legitimacy of "the national security" through the epistemological operation of positivism. Katzenstein counters: "State interests do not exist to be 'discovered' by self-interested, rational actors. Interests are constructed through a process of social interaction."[382] National interest and thus determinations of national security, assumed to be legitimate and rational, are valorized when set over against their Other—a realm of purely passionate and chaotic non-security and the non-rationality of interest misperception.[383]

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[376] *See* Katzenstein, *supra* note 46, at 2.

[377] Katzenstein, *supra* note 46, at 2. Katzenstein's edited anthology THE CULTURE OF NATIONAL SECURITY, *supra* note 46, contains nine detailed case studies, ranging from a focus on NATO to the concept of humanitarian intervention, that provide persuasive empirical data supporting the thesis of security as social and cultural construct.

[378] *Id.* at 4.

[379] *Id.*

[380] *See* Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 397 n.21 (describing the "mainstream practice" in international relations of anthropomorphically equating states and individuals).

[381] *See* BARTELSON, *supra* note 353, at 162. In Bartelson's analysis, "the concept of interest is as ambiguous and primitive as it is central. Interest is never defined in the abstract, but used to define all other concepts with which it entertains inferential or metaphorical connections." *Id.* The national interest is *ex hypothesi* universal, ontologically unitary, given by some unexplained subject—the nation. *See id.*

[382] Katzenstein, *supra* note 46, at 2. To illustrate the nonfixity of national security issues, Katzenstein describes the changes that have occurred since the early twentieth century when pronatalism, eugenics, and other forms of population control were viewed as key national security issues. It is only with the onset of the Cold War that national security took on its predominantly military definition. *See id.* at 10. More recently, the security concept has undergone further changes. *See supra* note 54.

[383] *See* BARTELSON, *supra* note 353, at 180.

Liberal legal reformism has not escaped the effects of "securitization," a process whereby societal institutions and practices undergo fundamental transformations in response to a cultural climate of fear and perceived perpetual national security crisis.[384] Yet, the concept of security arguably underlying all postwar foreign affairs law[385] has not been subjected to systematic critique.[386] As a result, scholars have left unexamined the process by which foreign affairs law has been ideologically, epistemologically, and culturally inflected through the process of securitization.[387] Indeed, many now accept the image of "national security state" as the very paradigm of the state in late modernity.[388]

These three contributions of IR critical theory—rejecting the unitary state and offering in its place, for example, the culturally and socially constructed state-as-institution; challenging the inside/outside

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[384] I borrow the term "securitization" from Ole Waever. Ole Waever, *Securitization and Desecuritization, in* ON SECURITY 46, 47–54 (Ronnie D. Lipschutz ed., 1995).

[385] *See* Paul, *supra* note 7, at 708.

[386] *See* HENKIN, *supra* note 14, at 53. Henkin writes: "'National Security' is not a constitutional term, and it is a concept too uncertain to support authority beyond what can be distilled from the responsibilities and powers bestowed on the President by the Constitution." *Id.*

[387] *But cf.* Paul, *supra* note 7 (arguing that "exigency" discourse affected all of foreign affairs law). The concept of national security has changed dramatically during the period from before the bombing of Pearl Harbor by Japan through the post-Cold War years. Koh describes changes of the era as involving the United States' pursuit of its perceived interests through war, treaty making, military spending, and "international summitry." Furthermore, there were changes in the way national security would be prosecuted under the law. In 1947, for example, the National Security Act created two institutions which were to profoundly shape the way the United States would conceive of and pursue national security—the Central Intelligence Agency (CIA) and National Security Council (NSC). Both the CIA and NSC developed operational styles which greatly diverged from the respective missions envisioned by Congress for these "advisory" organizations. *See* KOH, *supra* note 67, at 48–64 (arguing that the usurpation by the CIA and NSC of operational powers, *ultra vires* of their congressional mandate, has amounted to a rewriting of the consitutional regime covering national security); *see also* CAMPBELL, *supra* note 73, at 153–243 (tracing discursive continuities and discontinuities in the "writing of national security," i.e., the contingent process by which security has been constructed over the course of U.S. history).

[388] The term "national security state" refers generally to Cold War governmental practices, beliefs, and the statutory framework instantiating "national security." *See, e.g.*, National Security Act of 1947, ch. 343, 61 Stat. 495 (codified as amended at 50 U.S.C. §§ 401–413, 421–26 (1982 & Supp. I 1983)), as amended by Central Intelligence Agency Information Act, Pub. L. No. 98–477, § 2(a), 98 Stat. 2209 (1984) (creating the National Security Council, and Central Intelligence Agency, Department of Defense); Professor Harold Koh traces first usage of the term "national security" to the title of the 1947 Act. *See* KOH, *supra* note 67, at 262 n.23. *See generally* Morton H. Halperin, *The National Security State: Never Question the President, in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986 50 (Herman Schwartz, ed., 1987); SAUL LANDAU, THE DANGEROUS DOCTRINE 2 (1988). For a discussion of the national security state in the context of the struggle for lesbian and gay rights, see Richard Cleaver, *Sexual Dissidents and the National Security State, 1942–1992, in* A CERTAIN TERROR: HETEROSEXISM, MILITARISM, VIOLENCE AND CHANGE 1 (Richard Cleaver & Patricia Myers eds., 1993). Harold Lasswell first suggested the related concept of the "garrison state" in 1937. *See* Harold D. Lasswell, *Sino-Japanese Crisis: The Garrison State Versus the Civilian State*, 11 CHINA Q. 643 (1937).

dichotomy and its effects; and viewing "security" as a social and cultural (discursive) construct—constitute a radical challenge to the IR realist foundations of foreign affairs law. If, as IR critical theorists argue, IR realism comprises a set of ideas whose time has passed, then it may be appropriate to reject the conceptual framework of foreign affairs law. An important step toward disengaging the discipline from its past commitments is to foreground those experiences, such as internment, where the contradictions and vagaries of IR realist ontologized foreign affairs law are manifest. Toward this end the next section suggests a way to place the internment within the post-IR realist conceptual framework of a reconstructed foreign affairs law.

B. *The Legacy of Internment: Shadow or "Loaded Weapon"*

In understanding the legacy of the internment, we might consider two different metaphors: the "loaded weapon," suggested in Justice Jackson's *Korematsu* opinion,[389] and the "shadow," from the title of this Symposium. Jackson's reference to the loaded weapon implied the direct precedential effect the internment cases might have under the doctrine of stare decisis. He knew that once the Court sanctioned the government's actions it would be hard to constrain similar future abuses of governmental power. The shadow metaphor suggests a legacy that is at once more inscrutable and potentially more insidious. As shadow, the internment may have unexpected consequences, not all of which, however, are necessarily deleterious. For reasons I will explain in this and the next section, although both are important, I think the shadow metaphor of the internment's legacy may be more useful for understanding the role of race in foreign affairs and ways of using race critical approaches to target elusive "non-raced" paradigms such as IR realist-driven foreign affairs law. Sadly, however, the loaded weapon of the internment precedents may persist as well.

To begin this discussion let us return briefly to Chief Justice Rehnquist's book on civil liberties in wartime since it no doubt will have reinvigorated the battle over the internment's legacy.[390] The book, ostensibly a historical survey of situations ("wartime") in which the government was compelled to sacrifice civil liberties of citizens in the name of national interest,[391] is troubling for various reasons. Not least

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[389] *See* 323 U.S. at 246 (Jackson, J., dissenting) ("The principle [endorsed by the majority] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

[390] *See* REHNQUIST, *supra* note 1.

[391] The bulk of Rehnquist's book looks at Lincoln's suspension of habeas corpus and related

of these is how the Chief Justice normalizes the internment by smoothing out the historical record[392] and concluding that in "wartime" the courts might as well give the government (especially the President) wide latitude even in the face of "occasional presidential excesses."[393] Although he foresees the continuance of a "trend against the least justified of the curtailments of civil liberty in wartime," Chief Justice Rehnquist views philosophizing about the desirability of the President's wide discretion as an undertaking that is "very largely academic."[394] He writes: "There is no reason to think that future wartime Presidents will act differently from . . . Roosevelt [in interning the Japanese Americans], or that future Justices of the Supreme Court will decide questions differently from their predecessors."[395]

Rehnquist's normalization of the internment and other repressive governmental acts rests in large part on his assertion of temporal limits within which such acts will occur. He invokes the Roman maxim, "*inter arma silent leges*,"[396] roughly translated as "in time of war the laws are silent,"[397] to express the distinction he wants to draw between "wartime" and "peacetime" and the different conceptions of law each allows.[398]

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cases during the Civil War. *See id.* at 3–169. He includes a chapter on World War I and prosecutions under the Espionage Act, *see id.* at 170–83, two chapters on the internment, *see id.* at 184–211, and a short chapter on the imposition of martial law in Hawai'i during World War II, *see id.* at 212–17. He includes an express disclaimer that the book is "limited to cases of declared war . . . ." *See id.* at 218.

[392] In a move that is hard to square with his detailed depiction of Lincoln's suspension of habeas corpus during the Civil War, and the *Milligan* case, *see supra* note 314, the Chief Justice virtually ignores the historical significance of the massive fraud perpetrated on the courts by the military and governmental actors who defended the internment. *See supra* Part II. Although Irons' indispensable book and the Government's critical self-study *Personal Justice Denied* are listed in the book's bibliography, there is little indication in the text or notes that the author actually consulted them. *See id.* at 232, 237–38. In addition to these omissions, the Chief Justice quotes from the Western States' amicus brief without mentioning that it was unethically authored under the auspices of a party to the suit or its problematic likely origins in the anti-Asian movement. *See id.* at 197–98. In addition, Rehnquist asserts that "[t]here was no physical brutality" suffered by the Japanese Americans who were victims of the internment, *see id.* at 192, a claim which the record does not support. *See* PERSONAL JUSTICE DENIED, *supra* note 212, at 10, 150–51, 162–65, 178–80 (describing inhumane conditions and violence suffered by the internees); DANIELS, *supra* note 215, at 108–09 (describing violence and hardships of camp life).

[393] *See* REHNQUIST, *supra* note 1, at 224.

[394] *See id.*

[395] *Id.*

[396] *See id.* at 218.

[397] *See id.* at 225.

[398] Rehnquist's wartime/peacetime dichotomy may not in fact even represent a meaningful empirical distinction. It is unclear whether there will ever be another war officially declared by Congress as required by the Constitution. Indeed, in the whole history of the United States, out of over 200 active deployments of U.S. troops abroad, only five wars have been declared by Congress, none since World War II. *See* FRANCK & GLENNON, *supra* note 105, at 649.

However, it is obvious that despite its articulation in temporal terms Rehnquist's book looks at the relationship between an external condition, war, and the internal legal order.[399] This is more than a matter of semantics, and we should consider how that which Rehnquist has stated in temporal terms is actually a spatialized conception of foreign affairs that IR critical theorists[400] have linked to IR realist-derived understandings of international relations.[401] I would argue that Rehnquist refers implicitly to a *spatial* condition of necessity that obtains "perpetually" in the vast external realm[402] of foreign affairs, where threats to the national interest exist structurally and atemporally.

The same slide from wartime necessity (temporally delimited, exceptional) to vast external realm necessity (spatio-structural, ubiquitous) occurs naturally, almost imperceptibly, in the postwar era's foreign affairs law.[403] There has been a seepage from the paradigmatic IR realist condition—war—into the broader realm of foreign affairs law, and even into domestic law as well.[404] In this light, Rehnquist's treat-

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[399] This relationship of the "outside" conditioning the "inside" continues to take new forms. Unwanted immigration, environmental degradation, terrorism, drug trafficking, overpopulation, industrial espionage, and corrupt business practices of overseas companies are examples of external "threats" that are thought to warrant internal legal fixes, sometimes repressive, presumptively conservative in nature. Sometimes this relationship takes the form of a refusal by courts to extend internal legal protections, such as civil rights, beyond the territorial boundaries of the United States. *See generally* cases cited *infra* note 405; EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) (refusing to apply U.S. employment discrimination law extraterritorially).

[400] *See supra* Part III.A.

[401] Indeed, the Roman maxim Rehnquist invokes is quoted as "silent enim leges inter arma" and translated elsewhere as the "laws are silent among the arms of war," suggesting much less the temporal notion of "wartime" than a spatial one ("among arms") more in keeping with the ritualistic and formalized war declarations of Rome. *See* Thomas David Jones, *The International Law of Maritime Blockade—A Measure of Naval Economic Interdiction*, 26 How. L.J. 759, 761 (1983); *see generally* A. Mishulin, *The Declaration of War and the Conclusion of Peace in Ancient Rome*, 10–11 HIST. J. 106 (1944). Taken alone the maxim even misrepresents the actual content of Roman law that did regulate warfare. *See* Jeffrey F. Addicott, *Operation Desert Storm: R.E. Lee, or W.T. Sherman?*, 136 MIL. L. REV. 115, 130 n.63 (1992). Moreover, the spatial ontology of modern foreign affairs law (based in the nation-state system) differs from that of Roman law (based on the "universal" law of *jus gentium* and *jus naturale*) in that the former does not provide a limiting logic for the operation of a nonlegal realm of "international relations." *See supra* Part I. I am grateful to Cherif Bassiouni for alerting me to the potential problems in Rehnquist's deployment of the given Roman Law maxim.

[402] Rehnquist signed two opinions, one of which he authored, that referred expressly to the vast external realm of *Curtiss-Wright*. *See* Regan v. Wald, 468 U.S. 222, 243 (1984) (upholding Government's restriction of travel to Cuba); Haig v. Agee, 453 U.S. 280, 292 (1981) (upholding Government's refusal to grant passport to former CIA operative turned dissident).

[403] *Cf.* R.B.J. Walker, *International Relations and the Concept of the Political*, *in* INTERNATIONAL RELATIONS THEORY TODAY, *supra* note 29, at 306, 308–09 (describing the relevance of spatial versus temporal conceptualizations of international relations).

[404] For evidence of the slide and seepage described in the text see, for example, Paul, *supra* note 7, at 708–22; Jules Lobel, *The Political Tilt of Separation of Powers*, *in* POLITICS OF LAW, *supra* note 26, at 591, 599–600 [hereinafter Lobel, *Separation of Powers*]; KOH, *supra* note 67, at 74–100.

ment of the internment may be taken as a defense of the whole structure of postwar foreign affairs jurisprudence, which has, not coincidentally, culminated during his tenure on the Court.[405]

Rehnquist needs and is able to discount the historical record of the internment because his understanding of foreign affairs relies on the IR realist ontological structure discussed in Part I. The distinct temporal demarcations—wartime and peacetime—and their respective spatio-ontological counterparts—outside and inside—are the trumping arguments Rehnquist can use to assert the inevitability of law having sometimes to speak "with a somewhat different voice."[406] "Wartime" invokes the operation of hyperpolitics ("relations") under conditions of anarchy's war of all-against-all. Norms and processes (e.g., equal protection, due process, and judicial review) designed to enjoin in the domestic context the anarchic operation of social and cultural forces neither survive the temporal redesignation nor the imposed spatial narrative of an outside condition extruding into the internal order.

The importance of the internment for understanding foreign affairs jurisprudence lies precisely in how it historicizes the legal paradigm Rehnquist seeks selectively to place in the abstract. In a move that is somewhat inversely related to the one made by government lawyers who knew they had to imbue the legal questions raised by the internment with the judicially noticed "factual record" of stereotypes and worse,[407] Rehnquist avoids the particular social and cultural determinants of the legal by having us take "judicial notice" of a particular ontological structure—wartime/peacetime and, implicitly, outside/in-

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[405] Rehnquist's tenure has been marked by the Court's selective deference to one or both of the political branches' exercise of foreign affairs powers, usually leading to an outcome that could be construed as conservative, protectionist, nationalist or imperial. *Compare, e.g.*, Breard v. Greene, 118 S.Ct. 1352 (1998) (refusing to stay state of Virginia execution of prisoner in light of possible treaty violations and request for stay by International Court of Justice under the treaty); Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (holding that President's high seas interdiction and return policy targeting potential refugees from Haiti did not violate law of refugees as incorporated into U.S. law by Congress); Hartford Fire Insurance Co. v. California, 506 U.S. 764 (1993) (extending Sherman Act extraterritorially to protect U.S. insurance industry from anti-competitive British companies' practices); United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding that federal court has jurisdiction over foreign national seized abroad by persons operating under the auspices of federal agency); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to Government searches and seizures overseas targetting nonnationals); Regan v. Wald, 468 U.S. at 243; Haig v. Agee, 453 U.S. at 292, *with* EEOC v. Arab American Oil Co., 499 U.S. 244 (1991) (refusing to apply U.S. employment discrimination law extraterritorially). *See generally* Harold Hongju Koh, *Reflections on Refoulement and* Haitian Centers Council, 35 HARV. INT'L L.J. 1 (1994); Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4 (1995).

[406] *See* REHNQUIST, *supra* note 1, at 224–25.

[407] *See supra* text accompanying notes 317–25.

side. The noticeable imbalance in Rehnquist's book, which takes great care to historicize Lincoln's actions (wartime suspension of civil liberties) and the *Milligan* decision that invalidated them, is necessary to achieve the end goal of defending the entire foreign affairs legal paradigm.

On the one hand, Rehnquist's selective historicization of *Milligan* allows him both to subtly undermine its validity[408] and occlude the particular social and cultural factors at work in the case (suggested facially in the vindication it afforded a pro-South northern sympathizer).[409] On the other hand, the minimal historicization provided in his discussion of the internment allows the Chief Justice to defend its validity without having to seriously engage the problematic racial and xenophobic determinants of state action outlined in Part II. The IR realist paradigm of foreign affairs law is most defensible through such selective historicization. More careful examinations of the social and cultural determinants of state action and state identity debunk the unitary state-as-subject concept and other attendant notions, such as national security (and military necessity), that underwrite the paradigm.[410] When the state and national security are understood as social and cultural constructs, and thus ontologically deprivileged, the paradigm of foreign affairs law that the Chief Justice has pursued in his years on the Court is demystified and rendered less defensible.[411] The relative interests of "insider" and "outsider" groups in the maintenance of that paradigm can be weighed in the absence of the analysis-ending

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[408] His conclusion regarding *Milligan* seems to be that the case was an important statement about civil liberties, but that it represents an unwise intervention in a matter that was too delicate for the courts to decide and a departure from standard narrowly targeted judicial review of government action. *See* REHNQUIST, *supra* note 1, at 136–37, 223.

[409] The book provides two chapters of background material on the repressive attitudes and deeds of Secretary of State William Seward, Secretary of War Edwin Stanton, and General Ambrose Burnside that resulted in the incarceration of over 13,000 civilians during the war. *See id.* at 40–74. However, the *Milligan* case arose in another equally important context that Rehnquist avoids—postwar reconstruction politics. Eric Foner has suggested that *Milligan* was an early indication of a campaign by the Court to challenge Republican reconstruction efforts. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 272 (1988) ("Although Justice David Davis, who wrote the [*Milligan*] opinion, insisted it had nothing to do with the South, the case threw into question the legality of martial law [operative in parts of the South to suppress 'depredations by armed bands of whites,'] and Freedmen's Bureau courts."). *See generally* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

[410] *See supra* Parts II, III.A. Rehnquist's anthropomorphization of law speaking with a "different voice," *see* REHNQUIST, *supra* note 1, at 225, is typical of a discourse of the state-as-subject that strives rhetorically to unify the divergent threads of civil society into one sovereign subjectivity. *See supra* Part I, III.A.

[411] *See supra* Part III.A.

assertion of an inside/outside (peacetime/wartime) ontological structure.

To understand the more positive aspect of the internment's "shadow" we might consider how it may help us see more clearly the faulty IR realist ontological underpinnings of foreign affairs law. In the same way that Marshall's Indian trilogy,[412] *Dred Scott*,[413] the *Civil Rights Cases*,[414] the *Chinese Exclusion Case (Chae Chan Ping)*,[415] *Plessy*,[416] the *Insular Cases*,[417] *Bowers*,[418] and *Adarand*[419] are part of a critical canon of precedents that reveal the trajectories of subordinationist legal paradigms, the internment plays a key role in explaining postwar foreign affairs law.

The critiques of state, inside/outside, and national security outlined above serve as points of departure for the critique of foreign affairs law. Each of these critiques corresponds to a broader claim that the conditions of modernity have shifted. Not only is modernity epistemologically limited by blindness to its own contingency, but the project of modernity is being challenged, if not replaced, in its *material* conditions of possibility. This is evident from the burgeoning of radically pluralistic types of political and cultural formation that increasingly structure "public" and "private" life at the millennium. Diversity movements, identity-based politics, syncretic cultural resistances to western cultural imperialism and, methodologically, transdisciplinarity, are all manifestations of these post-modern conditions.[420] Moreover, day-to-day social and cultural relations have become increasingly trans-national, with "civil society" impacting the realms of law and governance from both the "inside" and the "outside."

To be sure, we can expect the forms of modernity to be defended by social and political groups that gain advantage from their maintenance; such may be the context of Chief Justice Rehnquist's interven-

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[412] Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

[413] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[414] The Civil Rights Cases, 109 U.S. 3 (1883).

[415] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[416] Plessy v. Ferguson, 163 U.S. 537 (1896).

[417] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901).

[418] Bowers v. Hardwick, 478 U.S. 186 (1986).

[419] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[420] "Post-modern" as used here is primarily an historical designation, literally "after modern," and does not imply an endorsement of particular postmodern critical forms such as deconstruction or radical anti-essentialism that tend toward rejection of "deterministic" political analysis and "identity politics" of the type that are consistent with the post-modern political manifestations listed in the text.

tion. These groups are not monolithic and their boundaries are somewhat porous; nevertheless, power is exercised—consolidated by some but denied to others.[421] But even such modernist strongholds as foreign affairs law must face the post-modern condition. What are the parameters of the defense of modernism in the field, and how does this defense articulate with the imperial project that seemingly has always stood in a close relationship to foreign affairs law? To address these issues, the structures of foreign affairs law can be questioned by elevating to the level of "precedent" the breaks with "reality" that the modernist system of foreign affairs must negotiate in exercising its dominion. The internment represents just such a break because it confronts modernist IR realist ontology with a "postmodern reality"—incommensurable difference. Here, IR realist-derived conceptualizations of the state, inside/outside, and security are contradicted in the overt particularisms and identity-contingent (racist, xenophobic) exercises of power that drove state action and resistance to it. The internment jurisprudence, despite its rehabilitation by Chief Justice Rehnquist, continues to be a moment of truth for the IR realist framing of foreign affairs law.

Notwithstanding the emphasis here on the internment's legacy as shadow, it bears repeating that the "loaded weapon" of the internment as precedent for racial repression in the name of national interest is still available. Two recent examples suggest that the authorities Justice Jackson feared, those who would avail themselves of the loaded weapon, are not just a thing of the past. In the late 1980s it was reported that the Reagan administration had begun to plan for suspension of the Constitution and martial detention of dissidents, targeting in particular Central American refugees.[422] In 1991, during the Gulf War, the FBI engaged in sweeping investigations of Arab Americans that were likened to steps taken prior to the internment.[423] These

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[421] *See* Iglesias, *supra* note 26, at 377–86 (discussing how Latinas/os are affected by allocations of power in the trade—human rights linkage debates through the modernist discourses of development, dependency and neoliberalism).

[422] *See* Lobel, *Emergency Power*, *supra* note 54, at 1385.

[423] *See* Jamin B. Raskin, *A Precedent for Arab-Americans? Internment of Japanese-Americans during World War II*, 252 THE NATION 117 (1991), *available in* LEXIS, News Library; Joanne Hirase, *The Internment of Japanese Americans: The Constitutional Threat Fifty Years Later*, 19 J. CONTEMP. L. 143, 182 n.253 (1993). For another example from the late 1960s of the Government contemplating detention of racial minority dissidents, see George Lardner, Jr., *Detention Suggested for Black Guerrillas*, L.A. TIMES, May 6, 1968, at 1, which describes House Committee on Un-American Activities report suggesting that Black Nationalist activities may constitute a state of war, warranting use of detention centers and suspension of civil rights protections. For a recent Hollywood treatment of the mass-detention-of-unpopular-minorities motif, see THE SIEGE (Fox 1998), which depicts Arab American internment in response to a terrorism scare.

examples are sobering reminders that the fascistic potential of the internment as loaded weapon is still alive; indeed, the internment cases are still "good law," never having been overruled by a decision of the Supreme Court.[424]

IV. RACE AND FOREIGN AFFAIRS

Nobody will ever convince me that the foreign and domestic policies of this country do not come straight from the South.

—*Paul Robeson*[425]

The relationship between race and foreign affairs, or race and international relations, remains undertheorized, especially from a legal perspective. Scholars in areas such as immigration law and the law of U.S. imperialism have made progress recently in placing race at the center of the discipline's self-image.[426] In the context of international human rights, scholars have brought the insights of LatCrit theory[427] to bear on an area that, in this country, had remained remarkably

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[424] *See* Raskin, *supra* note 423. A lasting irony of the internment is that the application of "rigid scrutiny" in those cases (that amounted to nonscrutiny) has been the precedent for "strict scrutiny" review of affirmative action legislation, the device used by the courts to virtually outlaw society's attempt at race-conscious remediation of racial subordination. *See generally* Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165 (1996). As this article went to press I became aware of the publication of an excellent article on the legacy of *Korematsu*. *See* Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States: *A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. L.J. 72 (1996) (declaring *Korematsu*'s continued precedential effect in various areas of constitutional law).

[425] Carl T. Rowan, *Has Paul Robeson Betrayed the Negro?*, 12 EBONY 31, 33 (1957), *quoted in* PENNY M. VON ESCHEN, RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937–1957 180 (1997).

[426] In the area of immigration and nationality law see, for example, the Oregon Law Review two-part symposium *Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination*, 76 OR. L. REV., vol. 2–3 (1997). *See also* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995). In the area of U.S. legal imperialism see, for example, ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Ediberto Roman, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases* (1901–1922), 65 REV. JUR. U.P.R. 225 (1996).

[427] LatCrit theory draws together scholars from different communities "to reinvigorate the antisubordination agenda of Critical Race theory . . . revive its ethical aspirations, and expand its substantive scope by introducing new themes, perspectives, and methodologies." Elizabeth M. Iglesias, *Foreword: International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 178. *See generally* Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996).

devoid of race-critical perspectives.[428] However, whether scholars will develop a comprehensive race-critical approach to foreign affairs law generally remains to be seen.[429]

I will look briefly at four possible models for understanding the relevance of race in the "external realm," two of which have been discussed (IR realism and IR critical theory) and two of which derive from foreign affairs-related legal scholarship which has not yet been touched upon (interest convergence and race-internationalism). IR realism and IR critical theory suggest competing models of foreign affairs law and may underwrite widely diverging approaches to race and international relations, and race and foreign affairs law. The interest convergence and race-internationalist approaches offer race-critical theorists of foreign affairs law instructive points of departure.

First, IR realist approaches, because of their statist and positivist commitments, would be unlikely to countenance the effects of race in international relations. In turn, an IR realist-informed theory of foreign affairs law would be unlikely to delve beneath the surface of the state and related constructs (security, inside/outside) to conceive of doctrines, processes, and norms that would account for, let alone challenge, the operation of racist particularisms masquerading as national interest or related conceptual frameworks. Indeed, IR realist thinking would evince the same irreducible race-blindness typical of conservative domestic race legal theories that seek to construct impenetrable formal veneers around doctrines of equal protection and due process, insuring a jurisprudence devoid of substantive anti-subordinationist commitment. In both IR realist-derived foreign affairs and domestic race-blind formal egalitarianism, judicious considerations of race and other social and cultural determinants of state and private action are precluded at the level of paradigmatic assumptions.[430]

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[428] *See, e.g.*, Symposium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. (1997). For a recent article that uses human rights perspectives to mount a racial critique of U.S. immigration and welfare reform, see Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547 (1998).

[429] A number of sessions were organized at the New Approaches to International Law (NAIL) conferences of the mid-1990s that attempted to place critical race theorists in dialogue with critical international legal scholars. Unfortunately, the NAIL initiative seems to have ended before collaboration between the two groups could reach its fullest potential.

[430] So, for example, an IR realist framing would not be compatible with the analysis of the Gulf War from the perspectives of African Americans as undertaken by Henry Richardson. *See infra* discussion in this section of Henry J. Richardson III, *Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993). The IR realist paradigm rules out any appreciable significance of sub- or interstate minority group interest formation for international relations and, by extension, for foreign affairs law.

Second, IR critical theory approaches offer a more fertile ground for planting race at the center of the discussion. In particular, the so-called constructivist school,[431] which sees states' identities as variable and historically, culturally, politically, and socially determined,[432] provides an opening for race-critical approaches. However, as with other postmodern forms, constructivist theory may yield broadly distinct approaches to "identity politics."[433] "Radical constructivism" tends to reject foundationalist accounts of identity, which posit, if even provisionally, the closure of identity formation processes, and which forward an analysis of the effects of such identities.[434] "Conventional constructivism," by contrast, accepts the possibility of such closure of identity formation processes and thus, theoretically, countenances as analytically significant racially contingent identity formations. Even conventional constructivist approaches, however, do not *necessarily* view race and its effects as indispensable to an understanding of the external actions and discourses of nation-states, their representatives and institutions. Indeed, as far as I can determine, there has not been a significant body of international relations scholarship, even from the constructivist school, that has pursued a specifically race-critical approach.[435]

A third model for incorporating race into the study of international relations and foreign affairs law emanates from United States-based legal scholars of race and law. Derrick Bell's interest convergence thesis[436] has inspired work by Mary Dudziak showing that a "Cold War

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[431] *See supra* note 349.

[432] *See* Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 INT'L SECURITY 171, 181–85 (1998).

[433] *See* Sumi K. Cho, *Essential Politics*, 2 HARV. LAT. L. REV. 433, 434 (1997) ("If our postmodern sensibility leads us to a dead end of de-collectivized particularism, with a complete loss of vision for coalitional solidarity and audacious racial politics, then the usefulness of that kind of postmodernism needs to be rethought.").

[434] *See* Hopf, *supra* note 432, at 183.

[435] For one attempt to deal with race within a constructivist understanding of international relations, see Roxanne Lynn Doty, *The Bounds of 'Race' in International Relations*, 22 MILLENIUM: JOURNAL OF INTERNATIONAL STUDIES 454 (1993). Of course, the post-colonial literature, some of which deals directly with international relations but usually only indirectly with race, is vast. Perhaps not surprisingly, this work has looked closely at the concept of sovereignty and its implication for non-Western "nation-states." *See generally* SIBA N'ZATIOULA GOVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS, AND AFRICANS (1996); PERSPECTIVES ON THIRD-WORLD SOVEREIGNTY: THE POSTMODERN PARADOX (Mark E. Denham & Mark Owen Lombardi eds., 1996). For a recent comparativist analysis (though not "international" in focus) of the parallel significance of race in the nation-state formation processes of the United States, Brazil and South Africa, see ANTHONY W. MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, UNITED STATES, AND BRAZIL (1998).

[436] Bell developed the interest-convergence thesis and argued that the Cold War affected the case of *Brown v. Board of Education*. Derrick A. Bell, Jr., Brown v. Board of Education *and the*

imperative" affected the anti-segregationist politics and jurisprudence of the *Brown* era.[437] White interests may have momentarily coincided with Black and other minority interests around desegregation as a result of the danger that Third World peoples would reject U.S. leadership and favor the Soviet alternative because of the persistence of state-sanctioned white supremacy in the United States.

The interest convergence approach is significant for race-critical foreign affairs legal scholarship because it combines the study of domestic race relations with an awareness of conditions in the external realm. Performatively, it makes race an indispensable part of the inquiry. That is, in explaining domestic racial politics by looking to foreign affairs, the interest convergence approach prefigures its understanding of the international by application of a racialized explicative paradigm. Race is the impulse behind problematization of the external realm. The way data is collected, grouped, and narrated will be determined by the projection of a racialized paradigm of understanding onto the international terrain. In this way, the interest convergence approach might perform in a manner that is highly suggestive for the present discussion.

Consider, for example, the speech by President Eisenhower,[438] in which he refers to Little Rock's defiance of federal orders to desegregate as a "blot upon the fair name and high honor of our nation."[439] Eisenhower stresses, seemingly with sincerity, that Little Rock's recalcitrance poses a grave international threat "to the prestige and influence, and indeed to the safety, of our nation and the world."[440] I would argue that Eisenhower's concern for the foreign affairs implications of desegregation should be understood as part of a projected understanding of race relations onto the international realm. In other words, the Cold War imperative behind desegregation was actually constituted by con-

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Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523–24 (1980) ("Translated from judicial activity in racial cases before and after Brown, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

[437] *See* Mary Dudziak, *Desegregation as Cold War Imperative*, 41 STAN. L. REV. 61, 119 (1988) (adopting the interest-convergence thesis of Derrick Bell in tying 1950s desegregation efforts to the perceived need to bolster the international image of the United States for purposes of winning the Cold War); Mary Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 1715–16 (1997) (arguing that the Federal Government's response to the Little Rock desegregation crisis resulted primarily from a concern for foreign affairs consequences and maintenance of federal authority) [hereinafter Dudziak, *Little Rock Crisis*].

[438] *See* Dudziak, *Little Rock Crisis*, *supra* note 437, at 1681–82.

[439] *Id.* at 1682.

[440] *Id.*

ditions in the external realm *and* the socially constructed categories of understanding that were a result of "internal" racial formation imperatives being shaped by the political struggle over civil rights.[441] Indeed, the "Cold War" itself should not escape inquiry as a social and cultural construct and projection, which we may come to see more in terms of the politics of race, sexuality, and gender, and much less in terms of "geopolitics."

The drawback to the interest convergence approach, at least as it has been applied thus far, is that while it explains how domestic racial politics may be partially dependent on the imperatives of national interest pursuit in "external" relations, it does not analyze the international realm as a projection of, and dependent upon, "internal" conditions of racial subordination and resistance. Further, it does not provide a theoretical framework for grasping the foundational role of race in constructing conceptions of the national interest.[442] The interest convergence approach seems to assume pre-existing domestic and international political realms that confront the scholar or statesperson as givens. In this sense, although interest convergence theory suggests an approach superior to foreign affairs scholarship which fails to take any account of race and provides an important supplement to race analysis that "stops at the water's edge," it may replicate certain aspects of IR realism. At least for the particular purposes of analyzing a causal link between perceived external conditions and internal race politics, it may adopt overly positivist conceptualizations of both the national interest and external realm.

In contrast, a fourth model suggested by Henry Richardson's provocative inquiry into the Gulf War from the perspective of African American interests complexifies the ontology of interest convergence thinking and adopts a constructivist sensibility in its understanding of the relationship between race and foreign affairs law.[443] Richardson evokes a long tradition of scholarship and activism in positing a uniquely African American interest in U.S. foreign policy[444] and trans-

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[441] *Cf.* VON ESCHEN, *supra* note 425, at 145–46 (describing W.E.B. Du Bois' concern that postwar African American civil rights leaders had abandoned the cause of African liberation, assuming instead an anti-Communist mantle in the hopes of securing domestic civil rights concessions in return).

[442] Also, to the extent the interest convergence approach would explain racialized phenomena (civil rights politics and jurisprudence) through the non-raced category of a "Cold War imperative," it may, no doubt as an unintended consequence, analytically decenter race.

[443] *See* Richardson, *supra* note 430.

[444] *See generally* ALEXANDER DECONDE, ETHNICITY, RACE, AND AMERICAN FOREIGN POLICY: A HISTORY (1992); GERALD HORNE, BLACK AND RED: W.E.B. DU BOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944–1963 (1986); PAUL GORDON LAUREN, POWER AND PREJUDICE:

national racial formation along an "axis of the local-national-international unity of African-Americans as a people."[445] So, for example, Richardson attributes the relatively lower levels of support for U.S. military intervention in Iraq among African Americans as compared to other Americans to an understanding by African Americans of the linkage between international and domestic trends.[446] He asserts, "Afro-America views the furtherance of its own welfare as achievable only by breaking down the distinction—long inscribed in American law, policy and rhetoric—between the government's 'foreign' policy and 'domestic' policy."[447] Richardson offers an interpretation of African American internationalism[448] that sees empowerment of African Americans as necessarily tied to international strategies "for the liberation of all similarly situated peoples."[449] Such an interpretation disaggregates African American and U.S. official positions on foreign affairs law (understood as international law incorporated into the domestic system).[450]

Richardson's understanding of African American internationalism and his tracing of its consequences for foreign affairs and international law are signal. Consider his proposal for a race-conscious law of self-defense: "the right of a state to use military force in self-defense should be conditioned on the equitable participation of the diverse peoples and 'minorities' represented in its population in the effective power processes and authoritative decision processes regarding its characterization of the situation as requiring a military response."[451] The proposal also includes a meta-procedural requirement of "authentic" representation to preclude tokenistic participation.[452] As Richardson himself is well aware, such a proposal is unlikely to become part of the international law of self-defense anytime soon.[453] However, as an

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THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION (1988); BRENDA GAYLE PLUMMER, RISING WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935–1960 (1996); VON ESCHEN, *supra* note 425. I am grateful to Gerald Horne for directing me to this body of scholarship. *See also* Dudziak, *Little Rock Crisis, supra* note 437, at 1648 n.26 (citing works by historians on race and foreign affairs).

[445] *See* Richardson, *supra* note 430, at 50.

[446] *Id.* at 54.

[447] *Id.* (tracing this thinking back to W.E.B. Du Bois).

[448] I focus on one of two variants of African American internationalism discussed by Richardson. The other one, obviously less useful for the approach taken here and not championed by Richardson, holds "that excellence in military service during U.S. wars confirms blacks' stakes in this country and promotes enforcement of their legal rights." *Id.* at 60.

[449] *Id.* at 63.

[450] *See* Richardson, *supra* note 430, at 63–64.

[451] *Id.* at 70.

[452] *Id.*

[453] *Id.* ("[U]nder current law such an interpretation would be *de lege ferenda* rather than *lex*

illustration of a race-conscious constructivism that rejects unitary notions of state identity and positivist understandings of external threat, the proposal takes us a long way toward imagining a race-critical approach to foreign affairs law.

By extrapolating from the interest convergence and race-internationalist approaches of Dudziak and Richardson, respectively, one can begin to imagine a theory that views both internal and external realms as mutually constituted through a transnational process of racial formation.[454] A race-critical approach to foreign affairs law should strive to problematize both realms as mutually determined constructs rooted in the racial formation process. Developing a genealogy of foreign affairs law, then, means reading the record with an eye toward understanding possible implications of discursive events for the broader project of racial formation. These implications can be both subordinationist and resistant.[455] Developing a project to transform foreign affairs law means conceptually reforming the field by structuring race and other identity-contingent elements into the discipline's ontological foundation.[456]

As noted above, reformers of foreign affairs law often pin their hopes on the promise of a more balanced system of power-sharing between the legislative and executive branches. Under such a system, the courts would actively referee separation issues, while insuring that the political branches do not unduly trample individual rights in the exercise of their shared foreign affairs powers. However, as Professor Lobel points out, such process-oriented reform will only be effective if

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lata. There is no authority for assessing the equity of a state's 'internal' decision processes to test the legality of the dispatch of military forces in the name of self-defense.").

[454] *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55–56 (2d ed. 1994). The definition of racial formation as stated by Omi and Winant entails "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed." *Id.* at 55. Further, racial formation "is a process of historically situated projects in which human bodies and social structures are represented and organized," *id.* at 55–56, and is linked to the "evolution of hegemony, the way society is organized and ruled," *id.* at 56. "From a racial formation perspective, race is a matter of both social structure and cultural representation." *Id.* Omi and Winant do not expressly posit transnational racial formation, but arguably their theory supports such an extension.

[455] *See id.* at 56–59 (using the concept of the "racial project" to show the politically divergent—regressive as well as progressive—interventions that together constitute racial formation). Thus, histories of resistances such as the "no-no" movement, see *supra* Part II, must not be overlooked.

[456] Although it is still a contested element of liberal legalism, such an identity-contingent ontology has already insinuated itself into the domestic legal framework. See generally Martha Minow's two books on the subject of law's treatment of identity and difference, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW (1997).

the "substantive worldview" behind foreign affairs policies changes.[457] To be sure, Lobel views favorably a return to a more traditional separation of foreign affairs power.[458] But he also suggests a more transformative vision of foreign affairs power separation that would entail: "internationalizing government" by subjecting "all states, including the United States, to the rulings and orders of international bodies such as an international court or legislature"; and "reviving communalist politics in which the citizenry, often acting through local communities, plays a more active role in determining our relations with peoples of other nations and in our national system of governance."[459]

A race-critical approach to foreign affairs law that builds on the critique of foreign affairs law offered in this article is actually consistent with Lobel's straightforward, two-pronged (simultaneously internationalizing and localizing) reconstruction of the field. Once the IR realist ontology of foreign affairs law is challenged and the theory of unitary state-as-subject, et al., debunked, an argument that the government should be bound by international standards of conduct takes on heightened resonance. Constituent members of the now non-unitary state, such as racial minorities, can expect to benefit from an internationalized sphere of normativity and political obligation that may be more in keeping with their race-internationalist communities of interest. As well, the local arena of political action that Lobel valorizes may rise ascendant in foreign affairs politics and law because the vaunted "one voice"[460] with which the nation must speak in foreign affairs gives way to the multiplicity of voices and interests obscured by the state-as-subject construct.

Returning briefly to the significance of the internment for developing this genealogy and transformative theory of foreign affairs, consider how the analysis above has suggested that the institutionalization of the imaginary sovereign self, the unified state-as-subject, has been a key ontological basis/effect of twentieth century foreign affairs law. From a race-critical perspective this development might be seen as an ongoing "corrective" to the particular racial formative legacy of civil

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[457] *See* Lobel, *Separation of Powers*, *supra* note 404, at 604–05 (calling for substantive, in addition to procedural, reassessment in the area of foreign affairs law).

[458] *See id.* at 608 ("Our Constitution's separation of powers contains a conservative bias toward preserving existing social relations yet also provides a forum of struggle that is flexible enough to be used by popular movements to advance their aspirations.").

[459] *Id.* at 609–10; *see also* Iglesias, *supra* note 26, at 383 (arguing for an "increasingly integrated international legal order that recognizes individuals and stakeholder groups as subjects of international law").

[460] *See supra* note 204.

war and reconstruction, when difference threatened to displace identity as the defining feature of the imagined national self. From this perspective the internment can be seen as a key discursive event[461] because it helped reestablish the racial unity of the national self. The racial unity implicit in the judicial voice of *Korematsu* and *Hirabayashi* provided a kind of historical counterpoint—thus aiding in the restoration of America's constitutive Anglo-Saxon unity—precisely at the quintessential modern nation state-defining moment, "wartime."[462]

An important aspect of the ensuing Cold War era is the reinstatement and rehabilitatation of this Anglo-American sense of national self.[463] The Cold War—declared, managed and profited from by elite whites[464]—can be viewed as the continuance of this reconstruction of an Anglo-American national subjectivity. The internment was part of the practice that recreated this "one voice" of foreign affairs. Indeed, only after *Korematsu* and *Hirabayashi* did the totalizing vision of *Curtiss-Wright* became truly viable. As well, *Youngstown's* balancing approach appears as epiphenomenal proceduralism next to this national self-enunciative telos of foreign affairs law—the restoration of particularistic white nationalism *qua* universalism that is part of the shadow legacy of the internment jurisprudence. A race-critical model of foreign affairs law would foreground the internment in launching a new vision of the discipline that prioritizes, et al., an overt anti-subordinationist commitment informed by expressly anti-IR realist insights.

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[461] The reference here to the internment as a discursive event includes physical aspects of the Japanese Americans' victimization. "Discourse" as used in this article includes social practices such as physical injury inflicted on minority group members, but also the forms of representation that constitute an indispensable part of those practices. *See supra* notes 18, 64.

[462] *See* JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 190–91 (1979) (discussing the importance of war and military resource mobilization in general for the consolidation of the nation-state).

[463] *Cf.* Cho, *supra* note 250 (discussing Warren Court race jurisprudence in terms of its role in "redeeming whiteness").

[464] *Cf. Introduction to* BLACK WORKERS 47–50 (Philip S. Foner & Ronald L. Lewis eds., 1989) (suggesting the abandonment of Black working class interests by unions in the Cold War period as a condition of the anti-Communist labor-capital accord of the postwar period).

Conclusion

This article mounts a critique of foreign affairs law by viewing the internment experience as an originary point in its modern development. It thus rejects treatment of the internment as anomalous and places it instead at the center of an important area of constitutional law and policy formation—foreign affairs. In order to understand the relationship of the internment to foreign affairs law, and to defeat the reinvocation of the foreign affairs legal framework in rationalizing the internment, it is necessary to isolate the ontological elements behind the legal framework. These ontological elements, in particular the notion of a unitary state-as-subject, the discipline-defining binarism of inside/outside (along with the attendant politics/relations distinction), and national security are shown to be IR realist in nature. The discipline's orthodoxy—its tale of two precedents (and related theory of foreign affairs constitutionalism), and the "little" constitutional dialectics (President versus Congress, individual rights versus state interests, and judicial review versus political branch autonomy)—is shown to be consistent with IR realist ontology.

Using the Japanese American internment history to gain a look "inside the state" as it purports to carry out its foreign affairs function, the critique of the ontological basis of foreign affairs finds empirical grounding. In contradiction to IR realism's uncritical and unnuanced positivism, examination of the internment reveals the micro-workings of state action, "national interest" pursuit, and foreign affairs law processes. Far from IR realist conceptions, highly particularized determinants of "state action," such as racism, xenophobia, economic exploitation, and bureaucratic competition, drive the policy and law of the internment. An alternative school of international relations thought, IR critical theory, is introduced to explain the lessons of the internment history. IR critical theory, by rejecting IR realist concepts of the unitary state, inside/outside (politics/relations), and security, facilitates using the internment as part of a new critical canon of foreign affairs law that places the status quo in a more critical light.

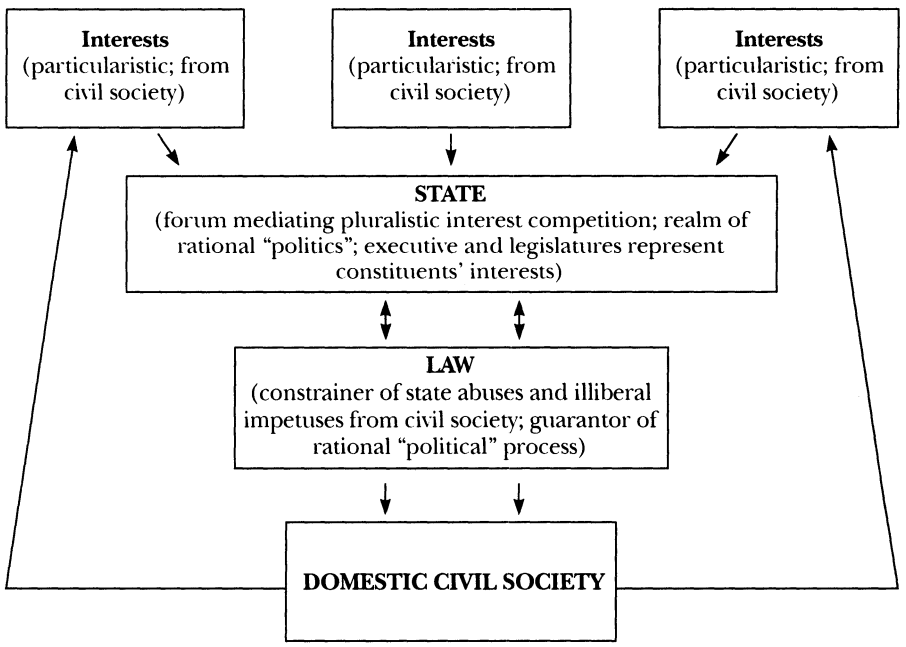
Finally, the article discusses the possibility of constructing a race-critical theory of foreign affairs law based in part on the internment experience. Four different models are examined for their promise in constructing such an alternative model. IR realist approaches, the least useful of the four models, do not countenance examination of the social and cultural constructedness of states and their foreign affairs processes. IR critical approaches may, but do not necessarily, foster a race-critical approach. So-called conventional constructivist

approaches contain the most potential for the immediate project. The interest convergence and race-internationalist approaches, both emanating from legal studies, hold much promise. The interest convergence approach applies a racial paradigm in its problematization of the "external realm," but may be overly positivist in its assumptions about the givenness of conditions in such a realm and the nature of the "national interest." The race-internationalist approach adopts a more constructivist sensibility, thus avoiding uncritical positivism and providing a highly suggestive model for race-critical foreign affairs law scholarship.

The approach taken in this article departs from mainstream foreign affairs law scholarship by centralizing a discussion of the ways racially contingent constructs may be allowed to operate through the deep structures of the discipline's conceptual framework and discourse. The analysis attempts to see the significance of internment for foreign affairs law beyond the doctrinal level, offering a genealogical and ontological understanding of the internment's significance. It rescripts the internment cases as key discursive events in the construction of a racialized, unitary national identity and national security culture that was and remains an important aspect of American culture and society during the postwar period. The significance of the internment cases cannot be tested only by measuring the doctrinal ripple effects the cases openly generate. Rather, the cases should be understood as the inauguration of foreign affairs law's postwar dance with a modern national security-derived state identity. As such, the internment precedent suggests the racial contingency of an area of legal discourse and social practice—foreign affairs—normally viewed as "politically," but not racially, constituted.

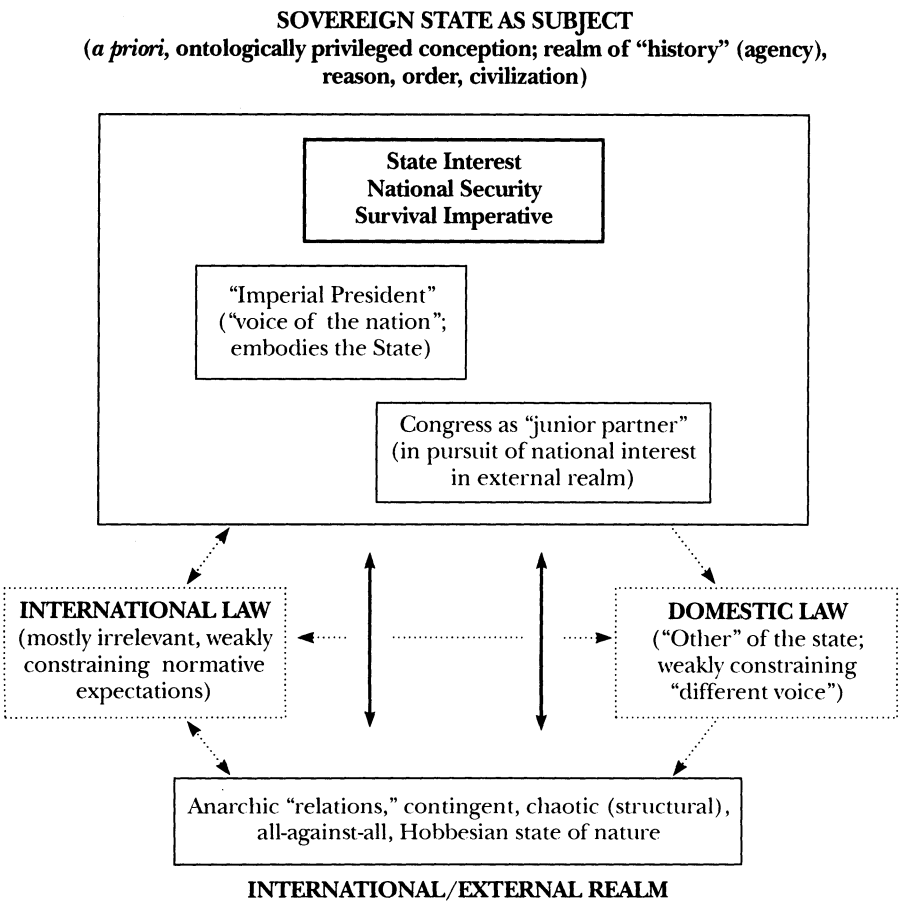
APPENDIX

Figure 1 A Liberal Model of Internal Affairs and Law



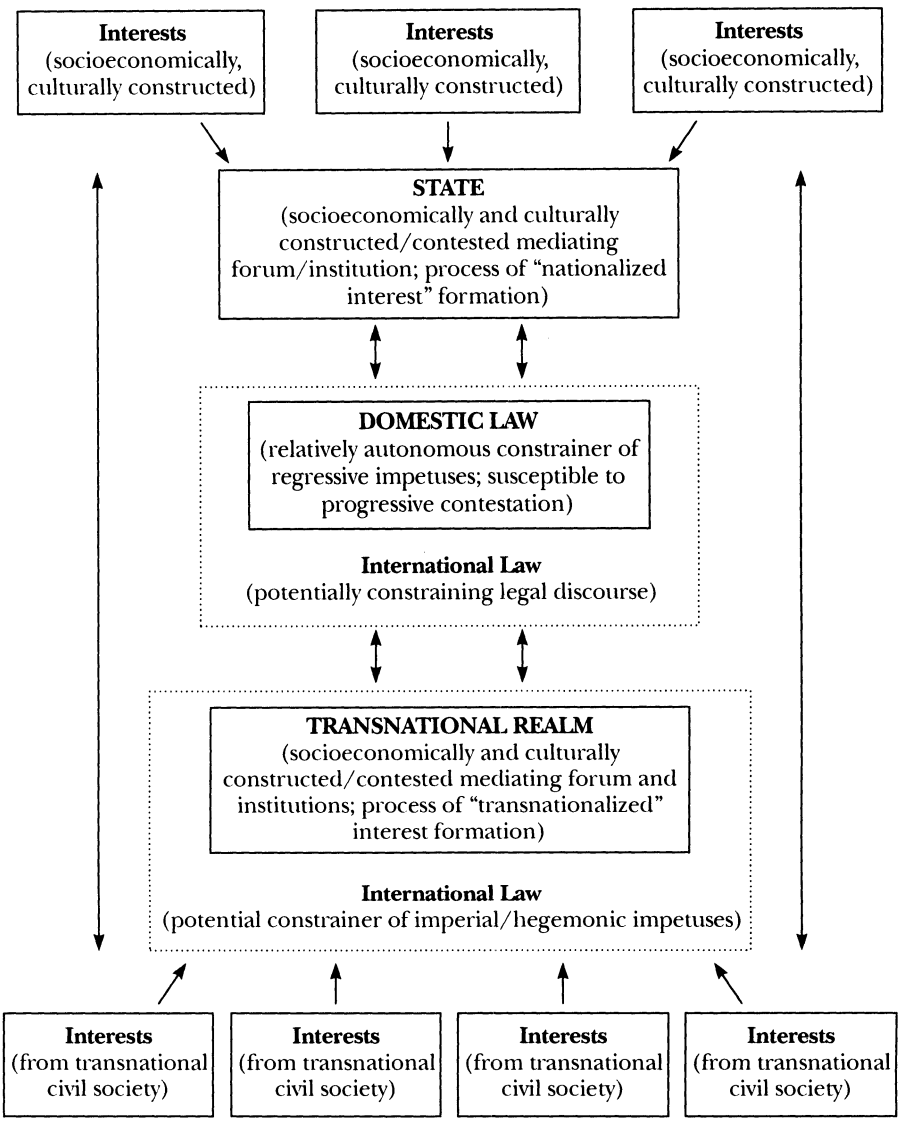
In the liberal model of internal law and politics, interests originate from among groups and individuals in domestic civil society. These interests, or preferences, are particularistic but rational, reflecting the individual subjects' or groups' calculus of interest maximization. The state and the organs of government mediate these often competing interests. Bargains are struck, compromises are reached, and "politics" in its rational, plural-democratic form obtains. Law may constrain the activities of the state and guard against arbitrary or illiberal outcomes of the political process. Domestic civil society is thus protected by law and its institutions from illiberal excesses that may originate in particularistic social or cultural interest formations and survive the state's mediation process. Both the state and the law appear as neutral entities.

Figure 2 An IR Realist Model of External Affairs and Law



The IR realist model of external affairs posits a unitary state in direct relationship to an anarchic external realm. Law (hybrid "dualist-monist" mix of domestic foreign affairs and international law) plays an attenuated role in constraining state actors and regulating the external realm. The state is treated as if it were an individual possessed of preformed interests and needs. Particular social, institutional and cultural determinants of state action remain untheorized (state as "black box"). The political organs of the state are assumed to transparently reflect state interests in the conduct of foreign affairs. The external realm is anarchic, making law (both domestic foreign affairs, and international law) relatively unimportant and potentially distracting to states pursuing their interests directly vis-à-vis other states. The internal realm defines the limits of history, agency, reason, order and civilization. The external realm is contingent (structural), ahistorical, and viewed as being perpetually in an anarchic state of nature.

Figure 3 A Critical Model of Transnational Affairs and Law



A possible critical model of transnational affairs and law assumes the social and cultural constructedness of "interests," which can arise from domestic or transnational civil society (nonmutually exclusive realms). The state (nonunitary) behaves like other societal institutions. It is the forum in which "nationalized interests"—contested, shifting—are formed and articulated in relation to the nation-state, but do not represent "national interests" in a monolithic modernist sense. Similarly the transnational realm is a constructed and mutable mediating forum, a network of institutions that facilitates "transnationalized interest" formation. Law (domestic and international) may constitute a possible constraining mechanism, providing a forum for progressive contestation of subordinationist and imperial policies and norms.